92-1251

Supreme Court, U.S.
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NO.:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT LEE ZIMMERMAN,

PETITIONER

v.

NORTHWESTERN MUTUAL
LIFE INSURANCE COMPANY
OF MILWAUKEE, ET AL.

RESPONDANTS

ON PETITION FOR A WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In deciding this lawsuit brought under 42 Section 1983, did the lower courts exceed their authority, abuse their discretion or otherwise err in declaring that:

1. a privately owned downtown park is "analgous" to a shopping mall;
2. a privately owned downtown park is not a public forum;
3. a total ban on free speech in that park does not violate the First Amendment;
4. a warrantless seizure and arrest of Petitioner for campaigning in that park is not state action, nor violative of constitutional rights;
5. amending the complaint and further discovery are futile?

LIST OF PARTIES

The only other parties not listed in the caption are Mall Management Associates, Bishop Square Management Inc., Frank F. Fasi and Douglas G. Gibb in their respective capacities as Mayor and former Chief of Police of the City and County of Honolulu, and the City and County of Honolulu.

Michael Secter, who had been campaign manager for Petitioner at the time of the arrest, had been a Plaintiff in in the U.S. District Court but was dismissed as a Plaintiff by that court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The judgment and memorandum opinion of the U.S. Court of Appeals for the Ninth Circuit appears at pp. 63-87 of the Appendix. Orders of U.S. District Court for Hawaii granting summary judgment to the public and private defendants appear at pp. 88-127.

JURISDICTION

The judgment and memorandum opinion of the court of appeals was

entered on August 21, 1992. Rehearing was denied on October 20, 1992; appears at pp. 61-62. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

Original jurisdiction was conferred on the U.S. District Court of Hawaii by 28 U.S.C. Section 1331 and appellate jurisdiction was conferred on the U.S. Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. Section 1291.

CONSTITUTIONAL AND STATUATORY PROVISIONS

The First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment:

"No person shall be deprived of life, liberty, or property without due process of the law and equal protection of the laws."

42 U.S.C. Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other

person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

1. Original Jurisdiction

Original jurisdiction was conferred on the U.S. District Court of Hawaii by 28 U.S.C. Section 1331 and appellate jurisdiction was conferred on the U.S. Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. Section 1291.

2. Background Regarding the Grassroots Campaign Strategy

In 1987, Petitioner initiated a grassroots political campaign for a U.S. Senate seat from Hawaii. The grassroots campaign's primary source of voter contact was the hand-to-hand distribution of

issues-oriented campaign leaflets, as unintrusively as possible, wherever voters gathered in traditional and appropriate public areas.

That grassroots campaign strategy, styled in part after the historical pamphleteering efforts of Thomas Paine and his peers, led directly to numerous interventions by and confrontations with public and private police, and several warrantless seizures, criminal arrests and criminal prosecutions.

3. Police Threats and Intimidations

On numerous occasions, Petitioner and his campaign

staffers went to parks, to shopping malls, to parking lots, to the state university and in these places were met by intimidating groups of public and private police whose various interferences and threats of arrest significantly chilled the campaign's ability to meet and greet prospective voters and discuss the issues.

With the passage of time the public and private police grew bolder and bolder, often harassing and threatening Petitioner and his campaign staffers with arrest.

As is generally the case, newspaper, television and radio advertising in Hawaii is very expensive. Thus, the grassroots

campaign relied almost exclusively on hand-to-hand leafletting. As leafletters, Petitioner and campaign staffers were friendly and unintrusive. Many months of campaigning in this way produced not a single complaint from the general public.

4. The Political Campaign Is Damaged By Police Interferences and then By the Arrest

The numerous police intimidations severely reduced Petitioner's ability to deliver the campaign's message to prospective voters and had a highly negative impact on the campaign's ability to

attract new campaign volunteers and keep the old ones.

Hawaii is a small place and those who speak out against mismanagement and corruption run the substantial risk of police intervention, ridicule and joblessness.

The first arrests occurred on and about the July 4th, weekend, 1988. Petitioner's campaign manager, a Native Hawaiian grandmother and Petitioner were arrested on separate days for distributing campaign literature to prospective voters outside the entrance to the Hawaii State Farm Fair. The fair itself is held on the grounds of a public high school

primarily for the benefit of the Hawaii Farm Bureau and private concessionaires. The grounds and facilities of the public high school are given over to these groups for zero rent and in return the state government's programs and the governor are showcased.

The Hawaii State Farm Fair free speech lawsuit was resolved in favor of free speech by freeing the state fair its discriminatory practices, but not until long after the campaign and lengthly criminal and civil trials.

For Petitioner's part in freeing the state fair from the dictatorial control of the state and the Hawaii Farm Bureau and

later for similar efforts to free Tamarind Park for free speech, Petitioner was depicted in the mass media as a criminal and televised with his arms handcuffed behind his back.

While being arrested for campaigning inside Tamarind Park (distributing copies of our Constitution and Bill of Rights to prospective voters), Petitioner spoke out to the public and private police alerting them that their action was violative of constitutional rights and that the mayor had his banner flying in the park and his people, city employees, were distributing leaflets in the park.

Petitioner was told by the public and private police that his constitutional rights were worthless and was arrested, again without a warrant, again with his arms handcuffed behind his back in full view of thousands of prospective voters.

REASONS FOR GRANTING THE PETITION

1. The Constitutional Issues of Free Speech and Warrantless Seizure and Arrest In Public Fora Are of Fundamental and Continuing Importance

Quoting Justice Stone in Hague v. CIO, 307 U.S. at 524:

"No more grave and important issue can be brought to this Court than that of freedom of speech and assembly, which the due process clause guarantees to all persons regardless of their citizenship..."

In deciding the merits of Petitioner's case the lower courts arbitrarily declared that a privately owned downtown park is, for purposes of applying constitutional law, analogous to a shopping center; App. at 69.

Such novel and inappropriate analogizing, whereby the lower courts arbitrarily substituted a non-existant shopping center for a fully operational downtown park, served to vaporize Petitioner's free speech and other rights and runs the significant risk, if allowed to stand, of diluting the fundamentals of the Bill of Rights to meaninglessness. Such action by the lower courts not only entirely

avoids the long-standing precedents of some of this Court's most quoted cases: It also creates constitutional law that defies the clear language of the First and Fourth Amendments.

What more can law-abiding citizens do as they pursue "life, liberty and the pursuit of happiness" than apply their common sense understanding of First Amendment free speech rights, as did Petitioner at Tamarind Park, to their day-to-day activities? Must we consult with constitutional experts before we distribute political leaflets? And even if we do seek the counsel of

constitutional experts, how are we to know which expert to rely on?

Even after the ruling of the lower courts in this case, it is highly unlikely that even the most sophisticated constitutional judges, lawyers and other scholars would know, or if they knew that they would agree, that for purposes of interpreting the First Amendment, that privately owned downtown parks are now to be treated as shopping centers and that our First and Fourth Amendment rights in such places are now inoperative.

2. The Lower Courts Greatly Exceeded Their Authority By Applying Improper Legal Standards To Avoid Long-Standing Precedents of the U.S. Supreme Court

In constructing their inappropriate analogy, which equates private, downtown parks to shopping centers, and thus avoiding this Court's ruling in Hague v. CIO, 307 U.S. 496 (1939) and its thousands of progeny, the lower courts never once referred to Hague or its progeny and instead relied solely on Hudgens v. NLRB, 424 U.S. 507 (1976) and Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

By analogizing a downtown park to a shopping center, something neither this Court nor any other

court has ever done, the lower courts circumvented long-established legal precedent and furthered the conflicts in the circuits that arise out of Hudgens and Lloyd, supra. No precedent exists in American jurisprudence or its forebears that justifies a total ban on political speech, much less a total ban that is discriminatorily enforced in a privately owned downtown park.

Ever since the work of the Framers of our Constitution free speech in all parks is considered sacrosanct, an inalienable right, as fundamental, ordinal and consecrated as any right can be.

Tellingly, as recently as June of 1992 this Court reiterated its concern over protecting First Amendment rights in public and private parks by declaring such places are "quintessential public forums." In upholding First Amendment protections, the right to distribute leaflets at airports, this Court could have analogized an airport to a shopping mall, but, again tellingly, it did not. Instead, each Justice concurred that streets and parks are "quintessential public forums." Quoting from International Society for Krishna Consciousness Inc. v. Lee, United States Supreme Court No. 91-155 (June 1992):

"The suggestion that the government has a heavy burden in justifying speech restrictions relating to traditional public fora made its first appearance in Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939). Justice Roberts, concluding that individuals have a right to use ""streets and parks for the communication of views," reasoned that such a right flowed from the fact that:

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the

guise of regulation, be abridged or denied." Hague, 307 U.S. at 515, supra.

The emphasis in Justice Robert's and this Court's reasoned conclusions, as above, is clearly on streets and parks "Wherever the title of streets and parks may rest..." The utter clarity of Justice Robert's aforesaid phrase, has left no doubt about its meaning and application: First Amendment rights abound in streets and parks regardless of who or what owns them.

In further support of free speech in streets, parks and other public fora in International Society for Krishna Consciousness Inc., v. Lee, United States Supreme

Court No. 91-155 (June 1992), Justice O'Connor advises that,

> "[w]e have required some explanation as to why certain speech is inconsistent with the intended use of the forum."

In this case Respondants have not offered any substantive explanation for banning free speech at Tamarind Park. Conversely, this Court has held clearly and consistently that certain public places appropriate for assembly, communication and debate have been traditionally accorded special recognition as "public forums." Hague, supra. In such places the ability of the government or of persons acting under color of law

to restrict expressive conduct is severely limited.

By tradition and historical usage, parks are public forums. "'Public places' historically associated with the exercise of expressive activities, such as streets, sidewalks and parks, are considered, without more, to be 'public forums.'" U.S. v. Grace, supra, 461 U.S. 171, 177.

The keys to whether or not public open space is a public forum have always been (1) the appropriateness of that space to serve as a public forum and (2) how the property is actually used. Whether or not the property is publicly or privately owned/and or

controlled is a non-issue. Concern for security and discipline on military bases, for public safety as in congested streets and roadways, and for quietude in areas that abut hospitals are legitimate reasons for invoking exceptions to First Amendment freedoms. But parks are an entirely different matter. Parks are "by long tradition devoted to assembly and debate..." Perry Education Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. 37, 45.

Thus, even if Tamarind Park is private property, its attributes and usages place it squarely in the public domain where First Amendment

rights to free speech are inviolate.

In U.S. v. Grace, supra, 461 U.S. 171, this Court struck down as unconstitutional regulations banning political leafletting on the steps of this Court's own building. In so doing, it noted that:

"[t]here is no separation, no fence and no indication whatever to persons stepping from the street to the curb and sidewalks that serve as the perimeter of the court grounds that they have entered some special type of enclave." Id. at 180.

There is nothing separating Tamarind Park from the municipal streets and sidewalks, nothing indicating that Tamarind is "some special type of enclave."

Tamarind Park is unenclosed, unposted and open to the public. To the average person it appears to be a public park, and an undelineated extension of the municipal sidewalk.

"[t]he First Amendment free speech guarantee' has its fullest and most urgent application precisely to the conduct of campaigns for political office.'" Taxpayers for Vincent v. Members of City Council, 682 F.2d 847, 850 (9th Cir. 1982) aff'd 466 U.S. 789, quoting Monitor Pariot Co. v. Roy, 401 U.S. 265, 272.

[Leaflets are] "the least expensive means by which a candidate may achieve name recognition among voters in a local election." Quoting Baldwin v. Redwood City, 540 F.2d 1368 (9th Cir. 1976), cert. den., 431 U.S. 913 (1977).

As a park, Tamarind is a traditional free speech setting and its public character is enhanced by Respondants co-sponsorship of

"Mayor's Aloha Friday" festivities each and every Friday afternoon.

To hold, as the lower courts have held, App. at 77-78, that it is perfectly reasonable to seize and arrest, without a warrant, a political candidate, in the midst of conducting a grassroots political campaign, for the crime of trespassing because he is peacefully and unobtrusively distributing copies of our Constitution to prospective voters not only defies this Court's numerous precedents as in Hague and its progeny, it also creates the serious risk of destabilizing our bedrock notions regarding democracy and constitutional law generally.

Surely, if it is reasonable to find probable cause to seize and arrest a peaceable U.S. Senate candidate for doing nothing more than handing copies of our Constitution to prospective voters in a downtown park, it is reasonable to declare that constitutional rights apply only within the confines of our homes and then only to those who own their homes outright and not to mortgagees or renters. If the owner of a downtown park can use the power of government to enforce a total ban on free speech, then why not every landlord and mortgage holder?

If the inappropriate park equals a shopping center analogy of

the lower courts is left standing, the foundation will be set for even greater erosion of our constitutional rights. Argument or justification by analogy may lead anywhere. As an example, the trial judge in the District Court had likened Petitioner's leafletting outside the entrance to the Hawaii State Farm Fair to breaking onto his property and shooting his bulls. In fact, all of history's horrors and atrocities can be justified by clever analogizing, but such cleverness is usually only compelling to the heartless and the mindless.

3. Circuit Court Conflicts Abound Regarding the Convertibility of Private Property Into Public Fora For Purposes of Free Speech and State Action

But, even if, by dint of the alchemistic analogizing of the lower courts, Tamarind Park was legally transformed into a shopping center and was no longer a downtown park, on the date and time that Petitioner was arrested there, Tamarind Park was clearly a public forum.

On July 22, 1988, the date of Petitioner's seizure and arrest, as on most Friday afternoons, the public was specifically invited (by leaflet and other media to attend, free of charge and without a

ticket, "Mayor's Aloha Friday", a public event co-sponsored with federal and municipal funds by Respondants.

Just as the Hawaii State Farm Fair was the exclusive political preserve of the State of Hawaii and its governor, Tamarind Park has been, and still is, the exclusive political preserve of Honolulu's mayor and city government. Only the state's political themes were displayed at the fair and even the mayor had been officially denied access. Similarly, Tamarind Park is the private political preserve of Honolulu's mayor. Only the mayor's banner flies over Tamarind

Park and only the mayor's messages are communicated to the public.

Thus, only the predatory and discriminatory enforcement of Respondant's ban on free speech by the public and private police can explain the seizure and arrest of Petitioner at a public event in a public place to which the public had been specifically invited.

Surely the transformation of the Hawaii State Farm Fair and Tamarind Park by government and their private sector partners into private political preserves is unconstitutional and such cooperative co-sponsorship should in itself be dispositve of the public forum issue.

Historically, fairs are public fora, places where political candidates can make contact with voters. Edwards v. Maryland State Fair and Ag. Society, Inc., 628 F.2d 282 (1980); Hynes v. Metropolitan Government of Nashville and Davidson County, 667 F.2d 549 (1982). Given the abundance of clearly established law regarding public fora and the exercise of First Amendment rights at such fora, Petitioner's distribution of political materials at such a forum was clearly protected political speech.

Additionally, on the date of Petitioner's seizure and arrest at Tamarind Park, not only was

Tamarind a public forum but the ban on free speech was selectively and thus discriminatorily enforced. At the very time Petitioner was seized and arrested, a banner was hung inside Tamarind Park which stated "City and County of Honolulu-Frank F. Fasi, Mayor-Presents the Mayor's Aloha Friday Music Break." And as on most Friday mid-afternoons, Defendants' co-sponsor "Mayor's Aloha Friday" festivities. The city uses tax and other revenues to pay the performers. City employees find the performers, schedule their appearances and assist in generating grant proposals for additional funding (including federal funds) and advertising copy

to publicize the events and invite the public. Such advertising is placed in the local media. For its part of the co-sponsorship, the private Respondants provide the park, maintenance and security personnel.

Clearly, these facts evoke a strong inference that the free speech ban at Tamarind Park was discriminatorily enforced. Other leafletters, including those representing the interests of the mayor and of the City and County of Honolulu, had made use of Tamarind Park as a point of leaflet distribution for a considerable period of time prior to Petitioner's seizure and arrest.

City personnel were not threatened with seizure and arrest for their leafletting activities. Interestingly, the very fact that city leafletters did not have knowledge of Respondant's free speech ban is proof that the ban was either a sham or selectively enforced. The public and private police did not enforce the anti-free speech leafletting ban against City leafletters at Tamarind Park. In fact, the record evidence indicates that the only time the anti-free speech ban was enforced was during Petitioner's political campaign.

4. The Lower Courts Erred In Failing To Apply the Public Functions Doctrine To Tamarind Park

Under the public function doctrine, as expressed in Terry v. Adams, 345 U.S. 461, 469-70, (1953), it is clear that the more a property owner "opens up his property for use by the public in general, the more do his rights become circumscribed by the statuatory and constitutional rights of those who use it." Thus, "the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit

the public and since their operation is essentially a public function, it is subjected to state regulations." Marsh v. Alabama, 326 U.S. at 506.

Tamarind, built, dedicated and operated as a public park, meets the Evans standard, 382 U.S. 296 (1966). Even if privately owned, it is municipal and public in nature and use. And as the private Respondants have voluntarily assumed the role of providing and operating a park, a role traditionally the exclusive perogative of the state, the private Respondants are state actors and Tamarind Park is, minimally, a limited public forum.

See e.g. Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981); and U.S. v. Grace, 461 U.S. 171, (1983).

Respondants have always referred to Tamarind as a park and have taken out full page advertisements to inform the public of Tamarind's public dedication, a dedication that has never been publically rescinded:

"One full acre of Bishop Square has been devoted to the creation of Tamarind Park, open for everyone to use and enjoy...Tamarind Park is respectfully dedicated to the...people of Honolulu...We want everyone to feel comfortable and safe. And we have lots of space for seating, where people can meet and talk..."

Tamarind also looks like a park, smells like a park and is

used as a park by the public 24 hours a day, 7 days a week, 365 days a year.

The dedication of Tamarind Park to the public, its continual use as a public park and as a place where public events are staged makes it a place where First Amendment rights of free speech are inviolate. See, Evans v. Newton, 382 U.S. 296 (1966). In Evans, a private trust established a park for the exclusive use of whites. This Court found that "the service rendered by a private park of this character is municipal in nature [and is] like a fire department that traditionally serves the

community." Id., 382 U.S. at 301-302.

It is clearly established "as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment." U.S. v. Grace, 461 U.S. at 176-177. "While government can place reasonable, time, place and manner restrictions on an individual's exercise of his right of free speech, absolute prohibitions require a compelling governmental purpose, narrowly drawn." 461 U.S., supra, at 175.

"Absent compelling circumstances, members of the public may not be excluded from public areas because of their purpose to use these areas for the

exercise of First Amendment rights."

In Niemotko v. Maryland, 340 U.S. 268,

277 (1951), as quoted in footnote n.4 of Planned Parenthood v. Clark

County School Dist., 941 F.2d 817

(9th Cir. 1991), this Court again

affirmed free speech rights in

parks declaring:

"[g]overnment's practice of granting or denying use of a park violates First Amendment because "[n]o standards appear anywhere; no narrowly drawn limitations; no circumscribing of this absolute power...."

The ban on political

leafletting at Tamarind Park is a

total and unqualified ban and as

such is facially unconstitutional

regardless of who or what prepared

it or when it was drafted.

5. The Lower Courts Erred In Failing To Apply Existant Hawaii Law To the Facts In this Case

Not only did the lower courts circumvent this Court's long-standing free speech precedents, as above, the lower courts gave zero credence to Hawaii law by dismissing the pendant state claims without a hearing and ignoring Hawaii constitutional law which gives to citizens First and Fourth Amendment rights even greater than those acknowledged under federal constitutional law.

The Hawaii State Supreme Court has ruled that the police may not effect warrantlesss arrests in

settings where First Amendment freedoms are implicated.

State v. Furuyama, 637 P.2d 1095 (1981).

The Hawaii State Supreme Court has also encouraged political leafletting in downtown business areas. Quoting federal precedent, the Hawaii State Supreme Court affirmed free speech rights at privately owned parks and retail business districts by declaring:

"[s]ome privately owned property may be treated as public for free speech purposes...Under some circumstances, privately owned property can be treated, for free speech purposes, as though it were publicly held. The right of access onto private property is premised on the fact that these places, such as sidewalks, streets, parks and retail business districts, are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot

constitutionally be denied broadly and absolutely." Estes v. Kapiolani Women's and Children's Medical Center, Haw. Sup. No. 13079, 787 P.2d 216 (1990); Hudgens v. NLRB, 424 U.S. 507 (1976).

6. Circuit Court Conflicts Abound Regarding Free Speech Rights In the Public Open Space Areas of Shopping Malls

Given the ever-decreasing ratio of of public to private space in the decades since Hudgens and Lloyd, supra, were decided, the ever-increasing velocity with which downtowns as we once knew them are being replaced with shopping malls, public streets, parks and sidewalks with private streets, parks and sidewalks, the ever-growing spending gap between party-sponsored and grassrooots campaigns

(with the Perot exception duly noted), as a matter of fundamental constitutional import which has produced wide discrepancies in the various circuits, this Court may wish to reconsider Hudgens and Lloyd.

First and Fourth Amendment rights were never intended to emanate exclusively from the possession of property and it is thus an unnecessary infringement on those rights to place restrictions on them in areas to which the public is specifically invited to congregate. Homes, retail stores, churches, military bases and other public and private property are, and ought to be, afforded

reasonable regulatory protection against unwanted speech. Such unwanted speech would be disruptive of the functions performed within these areas. But the general mall area of a shopping mall is more like public open space generally and serves to replace the traditional downtown and town square. Thus, absent compelling circumstances, there is no special, significant or substantive reason to justify banning free speech in the general mall areas of shopping malls. Such banning of free speech significantly elevates the property rights of a minority of mall owners over the First Amendment rights of approximately 260 million citizens

and empowers mall owners, who are a miniscule percentage of the total population, with a heavily disproportionate power to control what is said and the public's right to hear it.

7. The Lower Courts Abused Their Authority By Precluding Petitioner From Pursuing Discovery and Amending the Original Complaint

The lower courts abused their discretion by refusing Petitioner's numerous requests to take oral depositions and to amend the original complaint. Once, on appeal from the magistrate's ruling, the trial judge reversed the magistrate and ordered

Petitioner to pursue oral depositions and amend the original complaint. But that order was soon superceded by another order of the trial judge denying Petitioner the right to take oral depositions and to amend the original complaint. Petitioner had duly noticed numerous depositions and had repeatedly sought to amend the original complaint but each time Petitioner was precluded from so doing by the lower courts; App. at p. 82-84.

Thus, Petitioner was precluded by the lower courts from gathering important evidence including public documents showing the mutual benefits derived by the private and

public Respondants, the city's policy regarding arrests where constitutional rights are implicated, the mindsets of the police who participated in the arrest, the discriminatory enforcement of the ban on speech, the conspiracy between the Respondants to arrest Petitioner and discredit his political campaign and the like.

Clearly, the record evidence shows that pro se Petitioner was hamstrung by the district court when pursuing important discovery and amendment. While counsel for the private Respondant's who had clerked for the senior judge of the district court enjoyed every

benefit of his familiarity there, Petitioner was dealt with as a pariah and threatened by the magistrate with hundreds of thousands of dollars in sanctions for pursuing this lawsuit. Both the magistrate and the trial judge called Petitioner a criminal trespasser who had no constitutional rights.

The lower courts reasoning for precluding Petitioner from important discovery was simply that free speech at Tamarind Park is controlled by the same legal standards that apply to shopping malls and not those standards that apply to parks. Given that, the District Court declared that

[Petitioner] "has produced no such evidence, nor is there a possibility that further discovery would produce such evidence."

8. The Lower Courts Abused Their Discretion By Failing To Recuse the Trial Judge and the Magistrate

Petitioner had argued in the lower courts that for reasons of conflict of interest and bias that the trial judge and magistrate should have recused themselves. The magistrate in this case made six-figure profits from his dealings in a Honolulu City and County development project while hearing this case and failed to report those profits as required

under the judicial guidelines until those profits were reported in the local press. Petitioner sought his recusal with a motion to the magistrate and on appeal to the district court and to the court of appeals. Each time Petitioner failed.

If the writ of certiorari is granted, Petitioner respectfully reserves the right to brief the issue of the recusal of the magistrate and the trial judge.

9. Pendant State Claims

The pendant state claims in this lawsuit arise out of substantially the same set of facts as the federal claims but were

dismissed by the lower courts without a hearing and when these claims were brought in state court they were again dismissed without a hearing. If the writ of certiorari is granted, Petitioner respectfully reserves the right to brief the pendant state claim issue.

10. Considerable Changes Have Occurred In the Quantity and Quality of Public Open Space Since the Shopping Mall Cases Were Decided (1970's)

The free speech, conspiracy, seizure and arrest issues raised in this case have profound national and global implications. Given the intensifying budgetary pressures of urban governments, the vast urban

population migration to the suburbs, the increased implementation the concept of privatization of traditionally public functions and the replacement of many traditional downtown shopping areas with shopping malls, an ever-increasing quantity of public space is being converted to the private domain. Thus, less and less face-to-face space is available to grassroots, political candidates and others who wish to meet with the public to exchange political ideas. If the law of our land is held to mandate that a citizen may not pass to another citizen in a downtown park a copy of our very own Constitution

because the owner of the park, in this case an out-of-state mutual insurance company, has enacted a total ban on leafletting in that park, then we have replaced the rule of government with the rule of private parties, an act repugnant to the very essence of the Constitution's First Amendment which outlaws such action.

One of the earliest and crudest forms of governance is governance by private parties or clans. For most of man's history on earth a primitive competition had existed amongst innumerable clans who claimed dominion over one another and the land that they inhabited. Warrior clans clashed

with peaceable clans and for much of the time prior to the conceptualization and implementation of democracy, the peoples of planet earth were continuously terrorized and forced to live in a constant state of war, chaos and anarchy as clan warlords vied with one another for property and power. The collapsed government of Somalia is a contemporary example of such terror: As the competing Somalian clans vie with each other for property, power and dominance, hundreds of thousands of innocent people have starved and millions of others are at such risk.

In America at peace, absent compelling circumstances, no government, no private corporation, and no person has ever been vested with the power to alienate our fundamental rights and freedoms: Accordingly, all of the people of America, residents and visitors, rich and poor, proselitizers and politicians, ought not be subjected to the public humiliation of public seizure and arrest for exercising their right to speak freely in public places where the public is specifically invited to visit and congregate.

In this case, no compelling or otherwise substantive reason has been given for outlawing free

speech at Tamarind Park or any other park: Nor is Tamarind Park some special enclave, warded off from the general populace, established for purposes other than those which are traditionally parklike, like free speech.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the petition for a writ of certiorari should be granted.

DATED January 16, 1993

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 91-15705

D.C. No. CV-89-00484-ACK

ORDER

ROBERT L. ZIMMERMAN, Esq.,

Plaintiff -
Appellant

v.

NORTHWESTERN MUTUAL LIFE; MALL MANAGEMENT ASSOCIATES; BISHOP SQUARE MANAGEMENT INC.; FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu; COUNTY OF HONOLULU; DOUGLAS G. GIBB, in his capacity as the former Police Chief of the City and County of Honolulu, et al.

Defendants -
Appellees

Before BROWNING, PREGERSON and RYMER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

FILED OCT 20 1992

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-15705
CT/AG#: CV-89-00484-ACK

ROBERT L. ZIMMERMAN, Esq.

Plaintiff -
Appellant

v.

NORTHWESTERN MUTUAL LIFE; MALL MANAGEMENT ASSOCIATES; BISHOP SQUARE MANAGEMENT INC.; FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu; COUNTY OF HONOLULU; DOUGLAS G. GIBB, in his capacity as the former Police Chief of the City and County of Honolulu, et al.

Defendants -
Appellees

APPEAL FROM the United States

District Court for the District of Hawaii (Honolulu)).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu)) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____judgment of the said District Court in this cause be, and hereby is AFFIRMED.

FILED and entered 08/21/92

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NO. 91-15705

D.C. No. CV-89-00484-ACK

MEMORANDUM*

ROBERT L. ZIMMERMAN, Esq.,

Plaintiff -
Appellant,

v.

NORTHWESTERN MUTUAL LIFE; MALL MANAGEMENT ASSOCIATES; BISHOP SQUARE MANAGEMENT INC.; FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu; COUNTY OF HONOLULU; DOUGLAS G. GIBB, in his capacity as the former Police Chief of the City and County of Honolulu, et al.,

Defendants -
Appellees.

Appeal from the United States District Court for the District of Hawaii

Alan C. Kay, District Judge, Presiding

Argued and Submitted June 9, 1992 San Francisco, California

BEFORE: BROWNING, PREGERSON and RYMER, Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Robert Zimmerman brought an action against Northwestern Mutual Life and Bishop Square management, Inc. (the "private defendants"), and against Frank F. Fasi, the mayor of Honolulu, Douglas Gibb, the former Honolulu Police Chief, and the city and county of Honolulu (the "public defendants"), alleging

violations of 42 U.S.C. Sections 1983 and 1985 as well as various pendant state claims. The district court granted summary judgment in favor of both the public and private defendants on the federal claims and dismissed the pendant state claims. Zimmerman now appeals. We have jurisdiction pursuant to 28 U.S.C. Section 1291, and we affirm.

I

The district court granted summary judgment in favor of the public and private defendants on the Section 1983 claim on the ground that, inter alia, Tamarind Park is not a public forum. Based

on this determination, the district court concluded that the ban on handbilling does not implicate Zimmerman's First Amendment rights. Therefore, continued the court, Zimmerman could not demonstrate that he was deprived of a constitutional right, the necessary predicate to a Section 1983 action.

Zimmerman argues on appeal that the grant of summary judgment was improper because Tamarind Park is a public forum. We review de novo a grant of summary judgment. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 629 (9th Cir. 1987). We agree that summary judgment was proper because Zimmerman failed to

demonstrate a genuine issue of material fact as to whether Tamarind park is a public forum.

The uncontroverted facts show that Tamarind park is a portion of the privately owned Bishop Square commercial complex. As the district court held, the record evidence establishes that Tamarind Park is analogous to a privately owned shopping center, and the owners of the park are therefore free to enact a "no handbilling" regulation. See Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

Zimmerman argues that a 1983 newspaper advertisement for Bishop Square constitutes evidence that

Tamarind park was dedicated to public use and that therefore the park is a public forum. The advertisement states that the park is "open for everyone to use and enjoy." The advertisement does not, by itself, raise a genuine issue of material fact as to whether Tamarind Park was formally dedicated to public use, as it does not indicate that Tamarind park was in all crucial respects open to the public in the same ways a public park is. The advertisement alone does not distinguish Tamarind park from the shopping center in Lloyd, in which the Supreme Court held that property does not "lose its private character merely because

the public is generally invited to use it for designated purposes." Lloyd Corp., 407 U.S. at 569; see also United States v. Kokinda, 110 S.Ct 3115, 3121 (1990) (fact that postal entryways may be open to public does not by itself establish that such areas must be treated as traditional public fora under the First Amendment). The advertisement alone, therefore, is insufficient to create an issue of material fact as to whether Tamarind park is a public forum.

Zimmerman presented no other evidence demonstrating that Tamarind park was formally dedicated to public use. See Lloyd Corp., 407 U.S. at 570. He also

failed to present any other evidence that the private defendants, who own and manage Tamarind Park, invited the public to use the park unconditionally. See id. at 565. Furthermore, because there are public sidewalks surrounding the park, Zimmerman easily could have moved to the public space and continued his handbilling. See id. at 566-67. Finally, Zimmerman has failed to present any evidence, beyond his mere allegations, that the handbilling ban was discriminatorily enforced. See id. at 568. Summary judgment on this issue is accordingly appropriate.

Zimmerman also contends that Tamarind Park should be deemed a public forum because the city of Honolulu sometimes is permitted to present "Aloha Friday" concerts in the park. This argument lacks merit. The fact the private defendants allow entertainers to perform in Tamarind Park does not in and of itself render the park a public forum.[1]

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[1] Zimmerman also argues that the ban on handbilling violates the Hawaii Constitution. A Section 1983 action, however, must be predicated on a violation of the federal constitution (or a federal statute). See 42 U.S.C. Section 1983; see also, e.g., Guam Society of Obstetricians and Gynecologists v. Ada, No. 90-16704, slip op. 4191, 4200 (9th Cir. Apr. 16, 1992) (section 1983 creates liability for

deprivation of "rights, privileges, or immunities secured by the [United States] Constitution or federal law").

II

Zimmerman next argues that the total ban on handbilling is constitutionally defective. This argument is meritless. The Supreme Court in Lloyd Corp., 407 U.S. 551, specifically upheld a total ban on handbilling in a privately owned shopping center. See also Hudgens, 424 U.S. 507. Because Tamarind Park, like the shopping center in Lloyd, was privately owned, and because Zimmerman failed to raise a genuine issue of material fact as to whether it was dedicated to

public use or enforced its ban discriminatorily, a total ban does not infringe Zimmerman's First Amendment rights.

III

The district court also granted summary judgment for the public and private defendants on Zimmerman's Section 1983 claim based on an allegedly unconstitutional arrest and prosecution. Zimmerman makes three arguments on appeal: (1) that the citizen's arrest of Zimmerman constituted state action; (2) that the arrest violated his First Amendment rights; and (3) that the arrest and subsequent prosecution were unconstitutional

because the police lacked a warrant.

We need not determine whether the citizen's arrest constituted state action because, even if there were state action, there is no evidence of any constitutional violation. Because Zimmerman has no meritorious claim that his First Amendment rights were violated by the ban on handbilling, neither the private defendants' decision to enforce that ban nor Zimmerman's subsequent arrest for tresspassing implicates his First Amendment rights.

Zimmerman's allegation that a warrant was required prior to arresting him similarly lacks

merit. Zimmerman presented no evidence demonstrating that probable cause was lacking. Because the arresting parties had probable cause to believe that Zimmerman was trespassing, the warrantless arrest did not constitute an infringement upon any constitutionally protected right. See, e.g., State v. Vance, 602P.2d 933, 967 (Haw. 1979) ("[A] misdemeanor arrest by a police oficer without a warrant is lawful if the officer has probable cause to believe an offense is being committed in his presence."). Similarly, Zimmerman has not shown how his subsequent prosecution

violated any of his constitutional rights.

IV

The district court also entered summary judgment in favor of all the defendants on the Section 1985 conspiracy claim. The court noted that for Zimmerman to sustain a Section 1985 action, he must show racial or otherwise class-based, invidiously discriminatory animus. See Griffen v. Breckenridge, 403 U.S. 88, 102 (1971). The court then held that, because political candidates are not a member of a protected class under Section 1985, Zimmerman failed to show the class-based

animus necessary to support his claim.

Zimmerman now argues that the district court's finding was erroneous. The district court's holding however, correctly followed our precedent, see, Schultz v. Sundberg, 759 f.2D 714, 718 (9TH Cir. 1985), and is affirmed.[2]

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[2] Zimmerman also argues that there was "abundant state action" to support his Secion 1985 claim. We need not reach this issue, however, because Zimmerman has failed to present evidence of any class-based animus cognizable under Section 1985.

V

Zimmerman next contends that the district court abused its discretion when it refused to

permit Zimmerman to file an amended complaint. We conclude, however, that the district court did not abuse its discretion in denying the motion to amend. See Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990).

The district court may deny a motion to amend "if permitting an amendment would prejudice the opposing party, produce an undue delay in the litigation, or result in futility for lack of merit." Id. The district court specifically considered all three factors in evaluating whether to allow Zimmerman to file an amended complaint, and we cannot say that its determination that all three

factors indicated that a denial of the motion was appropriate constituted an abuse of discretion.

VI

Zimmerman further argues that the district court improperly denied him leave to conduct additional discovery. We review a district court's denial of a motion for further discovery for abuse of discretion. See Burns v. County of King, 883 F.2d 819, 824 (9th Cir. 1989).

We hold that the district court did not abuse its discretion in concluding that further discovery pertaining to the public defendants would be futile. As the

district court noted, no relevent evidence remained to be discovered. On appeal, Zimmerman lists numerous questions which he contends can only be answered after additional discovery. These questions, however, are irrelevent. Even if additional discovery on these issues was permitted, Zimmerman would still be unable to show a violation of his constitutional rights, the predicate to a Section 1983 action, or class-based animus of the type required to state a claim under Section 1985.

The district court also refused to allow additional discovery against the private defendants. Zimmerman's request

for additional discovery, however, was made more than a year after the complaint had been filed and after the court had already granted summary judgment in favor of the private defendants. Because Zimmerman had ample opportunity to conduct discovery prior to the filing of the summary judgment order, the district court did not abuse its discretion in denying Zimmerman's belated request.

VII

Zimmerman next challenges the magistrate's order granting the private defendants' Motion to Set Aside Entry of Default. We review the magistrate's order setting

aside the default judgment for abuse of discretion. See Pena v. Seguros La Comercial, S.A., 770 F.2d 811, 814 (9th Cir. 1985).

Zimmerman based his motion for default judgment upon his first amended complaint, which was filed without court approval. Although the magistrate did enter a default judgment against the defendants, he later set aside that default after finding that the first amended complaint "is, and was at the time of filing, a nullity because the filing of the First Amended Complaint was not authorized by the Court."

The magistrate acted within his discretion when he set aside a

default judgment which had been based on a complaint that was effectively a "nullity."

VIII

Zimmerman next argues that the pendant state claims should not have been dismissed. This claim lacks merit.

"When federal claims are dismissed before trial, the question whether state claims should still be entertained is within the sound discretion of the district court. Generally, dismissal of federal claims before trial dictates that the pendant state claims should also be dismissed." Schultz, 759 F.2d at

718 (citation omitted). Because Zimmerman's federal claims were properly disposed of on summary judgment, the district court did not abuse its discretion in dismissing the pendant state claims.

IX

Finally, Zimmerman notes on appeal that he unsuccessfully sought the recusal of both the district judge and the magistrate. Although Zimmerman mentions the recusal issue, he presents absolutely no argument as to why the judges erred in declining to recuse themselves. Because Zimmerman has presented no

argument, we deem the issue abandoned on appeal. See, e.g., Acosta-Huerta v. Estelle, 954 F.2d 581, 586 (9th Cir. 1992).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 89-00484-ACK

ROBERT LEE ZIMMERMAN,

Plaintiff,

vs.

NORTHWESTERN MUTUAL LIFE; BISHOP SQUARE MANAGEMENT INC.; FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu; COUNTY OF HONOLULU; DOUGLAS G. GIBB, in his capacity as the former Police Chief of the City and County of Honolulu, et al.

Defendants.

ORDER GRANTING CITY DEFENDANTS' MOTION FOR RECONSIDERATION, MODIFYING THIS COURT'S PREVIOUS ORDER, AND GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DISMISSAL

PROCEDURAL BACKGROUND

This above captioned case involves a pro se plaintiff, Robert Zimmerman, who has asserted various federal and state claims against Northwestern Mutual Life and Bishop Square Management (collectively referred to as the "private defendants"), and public officials Frank Fasi, Mayor of Honolulu, and Douglas Gibb, former Chief of Police of the Honolulu Police Department. The public officials are collectively referred to as the "city defendants." Zimmerman's allegations stem from his arrest for trespassing and arrest on land owned by the private defendants.

The procedural history of this case is confusing, and several previous orders bear directly on the decision this Court must make in regard to the instant motion. On September 24, 1990, this Court denied Zimmerman's motion for partial summary judgment regarding his federal claims. At the same time, this Court granted the private defendants' motion for summary judgment with respect to the federal claims. At that time, the city defendants' had merely filed a joinder in the private defendants' motion, with no supporting affidavits. The Court denied summary judgment with respect to the city defendants and

directed them to file their own separate motion if they wished to pursue summary judgment regarding the claims against them. A written order regarding this ruling was entered on October 23, 1990.

Subsequently, the city defendants' filed a summary judgment motion with respect to the federal claims. The private defendant also filed a motion to dismiss the pendant state claims remaining against them, and the city defendants joined in that motion. Both of those motions were heard by this Court on January 7, 1991 and taken under advisement.

While those two potentially dispositive motions were under

advisement, this Court received various appeals from magistrate orders regarding attempted amendments to the complaint and discovery sought prior to the city filing its summary judgment motion. The two that are relevant to this discussion are an appeal from a December 11, 1990 magistrate decision that denied Zimmerman's motion to amend his complaint. Also on December 11, the magistrate denied in part Zimmerman's motion to compel oral depositions. A January 4, 1991 written order by the magistrate was entered regarding that ruling. Zimmerman appealed those issues to this Court.

On March 7, 1991, this Court partially granted Zimmerman's appeal from the magistrate's ruling's. That order allowed Zimmerman to amend his complaint to add several new city defendants, to add new state tort claims, and to clarify another one of the state tort claims. Zimmerman was also allowed to add new private defendants, but only if they were being sued under one of the state tort theories. The March 7, 1991, order also allowed Zimmerman 60 days to conduct depositions with respect to his federal claims against city defendants, but did not allow depositions regarding the state tort claims unless the person

being deposed was also being deposed with respect to the federal claims against the city defendants. The city defendants have now filed a motion for reconsideration of that March 7, 1991 order, arguing that the Court's ruling was erroneous.

After careful reconsideration and review of the myriad of often confusing complaints, amended complaints, motions, countermotions, and orders in this case, this Court agrees with the city defendants that the Court's March 7, 1991 order was erroneous. In its endeavor to afford every opportunity to a pro se plaintiff to develop his case through

discovery and amendments to his complaint--even if such efforts were dilatory--this Court failed to focus sufficiently on the futility of such discovery and amendments to adequately buttress the vulnerability of Zimmerman's federal claims and prevent their dismissal. For the reasons set forth below, the city defendants motion for reconsideration is granted, portions of this Court's March 7, 1991 order are reversed, the city defendants' motion for partial summary judgment regarding Zimmerman's federal claims against them is granted, and the private and city defendants' motion to

dismiss the pendant state claims is granted.

DISCUSSION

A. Standards for Reconsideration

A motion for reconsideration pursuant to Fed.R.Civ. P. 59(e) must establish one of the following three grounds: (1) an intervening change in controlling law, (2) availability of new evidence, or (3) the need to correct clear error or prevent manifest injustice. Great Hawaiian Financial Corp. v. Aiu, 116 F.R.D. 612, 616 (D.Haw. 1987) (citing Major v. Benton, 647 F.2d 110, 112 (10th Cir. 1981)). A motion for reconsideration must demonstrate two things. First, it

must demonstrate some reason why the court should reconsider its prior decision. Second, it must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. Great Hawaiian, 116 F.R.D. at 616. The city defendants have met those burdens as a result of their arguments that this Court's March 7, 1991 order was clearly erroneous and would result in manifest injustice.

B. The Federal Claims

1. The Section 1983 Claim

This Court's October 23, 1990 Order, which granted summary judgment in favor or the private

defendants with respect to the federal claims, found that there was no state action with regard to the citizen's arrest of Zimmerman at Tamarind Park. More importantly for purposes of this discussion, that order found that Tamarind Park was not a public forum, that the regulations prohibiting handbilling at Tamarind park were reasonable, and that there were reasonable alternatives for Zimmerman's speech activities on the adjacent public sidewalks. See, Order, Denying Plaintiff's Second Motion for Reconsideration of Order, March 8, 1991, at pp. 3-6. Accordingly, Zimmerman has no meritorious claim that his First Amendment speech

rights were violated, either by private or city defendants, during the events surrounding the Tamarind Park incident. Consequently, the arrest of Zimmerman was a valid arrest for trespass.

The only remaining grounds left for Zimmerman's Section 1983 claim against city defendants are possible due process or fourth amendment violations that may have occurred during his arrest and subsequent prosecution by the city. There is no evidence, however, that Zimmerman's fourth , fifth or fourteenth Amendment due process rights were violated when he was taken into custody by the police at Tamarind Park. A perusal of the

evidence shows that the police were merely responding to a valid trespass violation and handled the arrest in a normal fashion. Zimmerman merely complains that he was handcuffed at the scene of the trespass for twenty-five minutes while waiting to be transported to the police station.

1

Such conduct pursuant to a lawful arrest for trespass does not rise to a violation of Zimmerman's liberty interest. As this Court noted in a related case, it is standard procedure for Honolulu police officers to handcuff an arrested person. See Zimmerman v. Nakatani, Civ. No. 88-488 ACK,

Order Granting Defendants' Motions for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment, July 3, 1990, at p. 45. It is ironic that upon his arrest in the Nakatani, case, Zimmerman complained of being put inside the police car while awaiting being transported to the police station. Now, in regard to his arrest at Tamarind park, Zimmerman complains that he was not put in the police car. In any event, Zimmerman's allegations about his treatment by the police, even if viewed in the light most favorable to Zimmerman, evidence no basis for a violation of his constitutional rights. Zimmerman's allegations contain no

evidence of brutality or exceptional conduct on the part of the police. Consequently, there is no need to allow Zimmerman to add the individual police officers as defendants in this case.

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[1] The Court notes that, in his original complaint Zimmerman claims he waited for 25 minutes while awaiting his transportation to the police station. Original Complaint at paragraph 23. Subsequently, in his declaration attached to his opposition to the city defendants' motion for partial summary judgment, Zimmerman states that he was left standing on the corner for a "minimum of 15 minutes." Zimmerman Declaration at paragraph 22.

In order to succeed in a Section 1983 action against supervisory defendants such as Gibbs and Fasi, Zimmerman must show

that the they failed to act or acted inadequately in the face of actual or imputed knowledge of a pattern of police misconduct. See Ybarra v. Reno Thunderbird Mobile Home Village, 723 F.2d 675, 680-81 (9th Cir. 1984)) (citing McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979). Zimmerman must show that persons in a position of responsibility were "so indifferent as to tacitly encourage, condone, or acquiesce" in unconstitutional behavior. York v. City of San Pablo, 626 F.Supp. 34, 36 (N.D.Cal 1985) (citations omitted). The city defendants have attached a Police Commission Report which shows that police brutality is not

pervasive and that disciplinary action is taken when appropriate. See Exh. A attached to City Defs'. Motion for Partial Summ. Judgment.

Zimmerman cites five incidents which he claims constitutes a pattern or custom on the part of the city to violate his constitutional rights. Three of those incidents involve an incident at the Hawaii State Farm Fair. This Court has already found that those arrests were not unconstitutional. See Zimmerman v. Nakatani, Civ. No. 88-488 ACK, Order Granting In Part and Denying In part Plaintiffs' and Defendants' Motions For Summary Judgment (December 27, 1989). The fourth

incident is the incident at Tamarind Park, which this Court has found did not violate Zimmerman's First Amendment rights, but was merely a legitimate response to a trespass. See Orders of October 23, 1990 and March 8, 1991. The fifth incident involves a trespass warning received from the private defendants and the city on April 15, 1988, as a result of Zimmerman attempting to pass out handbills at Tamarind park. See Exh. 7 attached to Zimmerman's Opposition to this Motion for Reconsideration. It is clear from the discussion above that such a warning is not an infringement of his constitutional rights. Zimmerman has failed to

state a federal claim arising out of his trespass and subsequent arrest at Tamarind Park and no amount of additional discovery will change that.

Finally, Zimmerman contends that because city prosecutors did not drop the trespass charges against him until the day of trial, his constitutional rights were violated. However, as was discussed above and in previous order, Zimmerman broke the law. The prosecutors were entitled to prosecute him for such conduct. Zimmerman cannot complain of that conduct.

In order to make out a Section 1983 claim against the city

defendants, Zimmerman must show that "persons in a position of responsibility were so indifferent to prior incidents of misconduct as to tacitly encourage, condone, or acquiesce in the conduct." York v. City of San Pablo, 625 F.Supp. 34, 36 (N.D. Cal. 1985). Alternatively, Zimmerman must show some official policy or custom which violates Section 1983, or participation by a final policymaker in the wrongful action, in order for a government body to be sued under that statute. See City of St. Louis v. Praprotnik, 108 S.Ct. 915, 922-26 (1988); Monell v. Dept. of Soc. Serv. of City of New York, 436 U.S. 658,

690-91, 98 S.Ct. 2035-36 (1978). The assertions made by Zimmerman in his original complaint--as well as in his subsequent proposed amended complaints which were never accepted by the magistrate or this Court--at most make out a claim that there exists a policy on the behalf of final city policymakers to arrest him for trespassing on private property. There is no evidence of a city policy or decision of a final policymaker to arrest Zimmerman in violation of his constitutional rights.

2. The Section 1985 Claim

Zimmerman claims under 42 U.S.C. Section 1985 that defendants conspired to violate his free speech rights. For this claim to succeed, Zimmerman must show some racial or otherwise class-based animus in the action. Griffen v. Breckenridge, 403 U.S. 88 (1971). Politicians are not a class that requires special federal assistance in the protection of their civil rights. Schultz v. Sundberg, 759 F.2d 714, 718 (9th Cir. 1985). Zimmerman has failed to show any class-based animus which would allow his Section 1985 action to go forward. Moreover, as discussed above, Zimmerman's First Amendment rights were not violated.

3. Zimmerman's Appeal From Magistrate Orders

As this Court stated in its March 7, 1991 order which partially granted and partially denied Zimmerman's appeal from the magistrate, the policy favoring amendments to complaints should be interpreted with "extreme liberality." United States v. Webb, 655 F.2d 977, 980 (9th Cir. 1981). In civil rights cases where the plaintiff appears pro se, the court must construe the pleadings liberally and must afford the plaintiff the benefit of any doubt. Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 623 (9th Cir. 1988). In this case, construing

Zimmerman's complaint and proposed amended complaint so as to afford him the benefit of any doubt, Zimmerman cannot prevail on his federal claims against the city defendants. His motion to amend his complaint was properly denied by the magistrate. This Court now amends its own order of March 7, 1991, insofar as it granted Zimmerman leave to file an amended complaint. Such amendment would be futile and shall not be allowed.

In its March 7, 1991 order, this Court also granted Zimmerman leave to conduct additional depositions . The Ninth Circuit generally disfavors summary judgment where relevant evidence

remains to be discovered. Klingele v. Eikenberry, 849 F.2d 409, 412 (9th Cir. 1988) (citing Taylor v. Sentry Life Ins., 729 F.2d 652, 656 (9th Cir. 1984). However, as discussed above, no relevant evidence remains to be discovered. Even if Zimmerman uncovered some "conspiracy" or "policy" in regard to his speech activities at tamarind park, at most it would be a conspiracy or policy to arrest him for violating the trespassing laws of the City and County of Honolulu. As for any due process violations with respect to how he was treated by the police, Zimmerman has personal knowledge of the facts relating to such a claim.

The allegations he raised in his complaint and in connection with subsequent summary judgment motions do not make up a Section 1983 or Section 1985 claim for violation of his due process rights. Zimmerman has had ample time to state such a claim. Consequently, further discovery would be futile in this case, and this Court now amends its March 7, order to the extent that it granted Zimmerman leave to conduct additional discovery. Zimmerman shall not have such leave to conduct additional discovery.

C. City Defendants' Summary Judgment Motion

The City Defendants', as moving party, have met their burden of identifying for the court the absense of any genuine issue of material fact in regard to the federal claims. Zimmerman, as a non-moving party, may not rely on the mere allegations in the pleadings to preclude summary judgment. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). At least some "significant probative evidence tending to support the complaint" must be produced by Zimmerman. Id. Zimmerman has produced no such evidence, nor is there a possibility that further discovery

would produce such evidence. City defendants' summary judgment motion regarding the federal claims against them, therefore, is granted.

D. The Pendant State Tort Claims

Zimmerman has attached a number of state tort claims against the defendants. Because this Court hss granted the city defendants' motion for summary judgment on the federal claims, only the state tort claims remain. This Court has discretion whether to retain jurisdiction over the pendant state claims. Rosado v. Wyman, 397 U.S. 408, 404 , 90 S.Ct. 1207, 1213-14 (1970). Such pendant state claims,

as a general rule, should be dismissed if the federal claims are resolved before trial. United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130 (1966). Courts have consistently followed this rule in cases involving federal civil rights statutes. See, e.g. Girard v. 94th Street & Fifth Ave., 530 F.2d 66, 72 (2nd Cir. 1976), cert. denied 425 U.S. 974 (1976). The rationales for the rule include avoidance of making needless decisions of state law, comity, and judicial economy, convenience, or fairness. Gibbs, 383 U.S. at 726.

Federal courts should dismiss pendant state claims absent special circumstances. Examples of such

circumstances include situations in which the defendant fails to call the court's attention to the weakness of plaintiff's federal claim until the court has invested a substantial amount of time on the case; the presence of significant questions of federal policy; and situations in which dismissal of the claims would sharply clash with the directive announced in Gibbs that the doctrine serve the ends of judicial economy, convenience, and fairness to litigants. Kavit v. A.L. Stamus & Co., 491 F.2d 1176, 1179-80 (2nd Cir. 1974). Even when acknowledging that pro se pleadings are held to a less stringent standard, courts have dismissed a

pro se's pendant state claims after a Section 1983 claim was dismissed. See, e.g., Jones v. Community Redev. Agency, 733 F.2d 646, 651 (9th Cir. 1984).

In an earlier case involving an arrest of Zimmerman, this court decided to exercise its discretion to retain pendant state claims. See, Zimmerman v. Nakatani, Civil No. 88-488 ACK (Order dated Dec. 27, 1989 at p. 47.) The Court found that it had expended substantial time and effort in the case. Id. More importantly, the Court had already considered some of the pendant state claims. Id. at 35-38.

In the instant case, no special circumstances exist that militate against applying the general Gibbs rule. The defendants promptly alerted the Court to the weakness of Zimmerman's federal claims. The time the Court expended on the case has been entirely focused on the federal claims. No question of federal policy remains. Fairness, comity, and economy would best be served by dismissing the pendant claims.

CONCLUSION

The Court hereby amends the portions of its March 7, 1991 order that granted Zimmerman leave to file an amended complaint and

granted Zimmerman additional time to conduct depositions. The Court also amends the portions of the March 7 order which continued consideration of the city defendants' motion for partial summary judgment and the private and city defendants' motion to dismiss the pendant state claims. The proposed amendments and depositions would be futile. Zimmerman's First Amendment rights were not violated by his arrest. Neither does Zimmerman's treatment by police or prosecutors after his arrest violate his due process rights. Any city conspiracy or policy related to this incident could only be a conspiracy or

policy to legally arrest and prosecute Zimmerman for trespassing. Consequently, the city defendants' motion for summary judgment with respect to the federal claims in this case is granted. Further, the private and city defendants' motion to dismiss the pendant state claims is also granted.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 17, 1991.

Alan C. Kay
United States
District Judge

ZIMMERMAN V. NORTHWESTERN, ET AL., CIV. NO. 89-484 ACK; ORDER GRANTING CITY DEFENDANTS' MOTION FOR RECONSIDERATION, MODIFYING THIS COURT'S PREVIOUS ORDER, AND GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DISMISSAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
CIVIL NO. 89-00484-ACK

ROBERT LEE ZIMMERMAN,
Plaintiff,

vs.

NORTHWESTERN MUTUAL LIFE; BISHOP SQUARE MANAGEMENT INC.; FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu; COUNTY OF HONOLULU; DOUGLAS G. GIBB, in his capacity as the former Police Chief of the City and County of Honolulu, et al.

Defendants.

ORDER GRANTING DEFENDANTS THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY'S AND MALL MANAGEMENT ASSOCIATES DBA AS BISHOP SQUARE MANAGEMENT INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED JULY 27, 1990, DENYING PLAINTIFF ROBERT LEE ZIMMERMAN'S COUNTER MOTION FOR PARTIAL SUMMARY JUDGMENT FILED ON SEPTEMBER 5, 1990, AND DENYING THE CITY DEFENDANTS' JOINDER IN DEFENDANTS THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY'S AND MALL MANAGEMENT ASSOCIATES DBA AS BISHOP SQUARE

MANAGEMENT INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT FILED ON SEPTEMBER 6, 1990

Defendants The Northwestern Mutual Life Insurance Company's and Mall Management Associates dba Bishop Square Management, Inc.'s Motion for Partial Summary Judgment filed on July 27, 1990; Plaintiff Robert Lee Zimmerman's Counter Motion for Partial Summary Judgment filed on September 5, 1990, and the City Defendants' Joinder in Defendants The Northwestern Mutual Life Insurance Company's and Mall Management Associates dba Bishop Square Management, Inc.'s Motion for Partial Summary Judgment filed on September 6, 1990, having come for hearing before the Honorable

Alan C. Kay on September 24, 1990 with Plaintiff Robert Lee Zimmerman appearing pro se; William A. Bordner on behalf of The Northwestern Mutual Life Insurance Company's and Mall Management Associates dba Bishop Square Management, Inc.; Arthur Muroka on behalf of Frank F. Fasi, in his capacity as Mayor of the City and County of Honolulu, the City and County of Honolulu, and Douglas Gibb in his capacity as Chief of Police of the Police Department; and no one appearing on behalf of Plaintiff Michael J. Secter, as Campaign Manager for Citizens for Bob Zimmerman, and the Court having considered the arguments presented,

the memoranda submitted, and the record and files herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Plaintiff ROBERT LEE ZIMMERMAN's Counter Motion for Partial Summary Judgment filed on September 5, 1990 is denied;

2. City Defendants' Joinder in The Northwestern Mutual Life Insurance Company's and Mall Management Associates dba Bishop Square Management, Inc.'s Motion for Partial Summary Judgment is denied without prejudice to refiling with appropriate affidavits; and

3. Defendants' The Northwestern Mutual Life Insurance

Company's and Mall Management Associates dba Bishop Square Management, Inc.'s Motion for Partial Summary Judgment filed on July 27, 1990 is granted. The court finds that the Plaintiffs' claims under 42 U.S.C. Section 1983 and Section 1985 are, as a matter of law, without merit. There is no genuine issue as to material fact and the court finds that the alleged activity complained of does not constitute action under color of state law or state action; that the premises on which the complained of activity took place was not a public forum; that the regulation prohibiting handbilling on the Bishop Square Complex

premises was reasonable and that the regulations applicable to the Bishop Square Complex and the nature and location of the premises, including the proximity of the adjacent municipal sidewalks, provided reasonable alternatives for plaintiffs' speech activities.

DATED: Honolulu, Hawaii,
Oct 23, 1990

ALAN C. KAY
JUDGE OF THE ABOVE-
ENTITLED COURT

Supreme Court, U.S.
FILED
FEB 11 1993
OFFICE OF THE CLERK

No. 92-1251

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

ROBERT LEE ZIMMERMAN,
Petitioner,

vs.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY OF MILWAUKEE, ET AL.
Respondents.

On Petition for Writ of Certiorari
United States Court of Appeals
for the Ninth Circuit

RESPONDENTS FRANK F. FASI, CITY AND COUNTY OF HONOLULU AND DOUGLAS G. GIBB'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner ROBERT LEE ZIMMERMAN's (hereinafter "Petitioner") arrest for trespass by private security officers in public open space in a privately owned downtown commercial and high-rise office complex, after Petitioner repeatedly refused to stop handbilling, was lawful in view of clearly established United States Supreme Court precedent holding that a privately controlled commercial center is not a First Amendment "public forum" for expressive activity, and private rules by a commercial center's property managers regulating such activity are not "state action"?

2. Whether, even if the First Amendment concepts of "state action" or "public forum" are implicated here, there were nevertheless reasonable "time, place, and manner" restrictions placed by private security officers on Petitioner when he was asked to move to the public sidewalk just a few steps away?

3. Whether Respondents FRANK F. FASI, CITY AND COUNTY OF HONOLULU, and DOUGLAS G. GIBB are liable under 42 U.S.C. Section 1983 to Petitioner for this arrest in any event, where the municipal police merely took Petitioner into custody after the citizen's arrest by private security, and reasonably believed there was "probable cause" for the arrest?

JURISDICTION

The Ninth Circuit issued its decision in this case on March 17, 1992. Petitioner then filed a Petition for Rehearing *en banc*. Rehearing was denied on October 20, 1992.

Jurisdiction in this Court is invoked pursuant to 28 U.S.C. Section 1254(1). Jurisdiction in the Ninth Circuit was conferred by 28 U.S.C. Section 1291. The federal district court had federal-question jurisdiction under 28 U.S.C. Sections 1331 and 1343, and 42 U.S.C. Section 1982. It properly declined to exercise jurisdiction over the pendent state claims, once the federal claims were dismissed.

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No. 92-1251

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

ROBERT LEE ZIMMERMAN,
Petitioner,

vs.

NORTHWESTERN MUTUAL
LIFE INSURANCE COMPANY
OF MILWAUKEE, ET AL.
Respondents.

On Petition for Writ of Certiorari
United States Court of Appeals for the Ninth Circuit

RESPONDENTS FRANK F. FASI, CITY AND COUNTY OF HONOLULU AND DOUGLAS G. GIBB'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents FRANK F. FASI, CITY AND COUNTY OF HONOLULU and DOUGLAS G. GIBB's (hereinafter "City Defendants") counter-statement of the case follows:

A. FACTUAL BACKGROUND

The Bishop Square Complex of commercial buildings and private open space (hereinafter "Bishop Square Complex") covers an entire city block of Honolulu, bordered by Bishop, King, Alakea and Hotel Streets. CR 36:2. The Pacific Tower is located on the King Street/Alakea Street or southeast corner, and the Pauahi Tower is located on the Bishop Street/Hotel Street or northwest corner. There are more than 20 retail shops at street level. The Hotel Street/Alakea Street or northeast corner is occupied by street level commercial space and a multistory aboveground parking garage. The Bishop Street/King Street or southwest corner is occupied by a multilevel underground parking structure, the roof of which is at street level. The underground parking structure roof has been landscaped with plantings and numerous pools which border the walkways leading to the main entrances to the office towers and the ground floor commercial spaces. It is the corner of the Bishop Square Complex known as Tamarind Park. CR 36:3.

The Bishop Square Complex was owned at all times pertinent herein by Respondent NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY (hereinafter "Northwestern") and was managed by Respondent BISHOP SQUARE MANAGEMENT, INC. (hereinafter "Bishop Square"). Northwestern paid the property taxes for the area, including the street level portion referred to as Tamarind Park. CR 36:3. Bronze markers embedded in the sidewalks around Bishop Square Complex declared that it was "Private Property. Permission to use revocable at any time." CR 36:4. While the public had access through Tamarind Park to the commercial, office and retail tenants located in the Bishop Square Complex, Northwestern, the owner, had

at no time ever dedicated Tamarind Park or any portion of the Bishop Square Complex to open space or public recreational uses. CR 36:4.

Although the public had access to Tamarind Park, Regulations Pertaining to the Use of the Tamarind Park/ Bishop Square (hereinafter "Regulations") had been developed and were enforced by Northwestern and Bishop Square to ensure that Tamarind Park projected an atmosphere which would enhance the value of the commercial and office spaces in the Bishop Square Complex as well as portray the relaxed, quiet, carefree image deemed by the owner to be suitable for Tamarind Park generally. CR 36:4.

The Regulations prohibit the distribution of handbills. The rule is intended to minimize potential annoyance to persons entering the Bishop Square Complex, reduce the potential for disorder and minimize litter. The rule against distributing handbills is nondiscriminatory, and precludes all distribution on the privately owned premises. The rule is applied evenhandedly to all those who are observed distributing handbills at Tamarind Park. CR 36:5.

City Defendants did not participate in the formulation of the Regulations. The City had no financial interest in the Bishop Square Complex. It was not consulted by Bishop Square or Northwestern on any matter involving the Bishop Square Complex or its management. CR 36:5. Tamarind Park is not a "public park" as defined in the Revised Ordinances of Honolulu 1978, as amended, Article 14, Section 13-14.1. CR 36:5.

In 1988, Petitioner was a candidate for the United States Senate. CR 36:5. In the spring and summer of 1988, Petitioner or his campaign workers came upon the Bishop Square Complex to distribute handouts or sell

materials. CR 36:6. On at least eight occasions, Petitioner or his campaign workers had been present on the Bishop Square Complex distributing handouts in violation of the Tamarind Park Regulations. They were asked to comply with the Regulations or to leave the premises. On two occasions, written trespass warnings were issued by Bishop Square. CR 36:7.

Petitioner, along with several campaign workers, again appeared on the Bishop Square Complex on July 22, 1988. CR 36:7. At that time, Petitioner walked through the Tamarind Park area distributing handouts. He approached George Krater, the head of Bishop Square security, who was in the park area. Mr. Krater asked Petitioner to stop distributing handouts or move to the nearby public sidewalks. CR 36:7. Representatives of the City and County were also distributing handbills which described an upcoming entertainment event and were asked to stop. The City and County people complied with Bishop Square's request. CR 46:18. Petitioner refused, the police were summoned, and a "citizen's arrest" was made by security officer Charles Hill, an employee of Bishop Square. CR 36:7. By the time Officer J. Pedro of the Honolulu Police Department arrived to take custody of Petitioner, the citizen's arrest had already been effected.

As a result, Officer Pedro was not consulted, did not confer with Hill or any other person, nor did he give any advice on the arrest. The officer did not know, nor was he told, that Petitioner was handbilling at the time of the arrest. Officer V. Kaopu then took Petitioner into custody for transportation to the receiving desk for booking on a criminal trespass charge.

The City and County of Honolulu sometimes applies for and is given permission to provide "Aloha

Friday" concerts at the Bishop Square Complex. Its role, however, is limited to that of providing entertainment. It is not given any control over the premises surrounding the "stage" area where the entertainers perform. It does not police or enforce the rules governing the Bishop Square Complex during the Aloha Friday concerts or at any other time. The performers provided by the City, such as the Royal Hawaiian Band or the 7th Fleet's Marine Band, are no more in control of the Bishop Square Complex than the City is.

There is no "agreement" with either the Mayor or the City to provide special events at the Bishop Square Complex on certain Fridays. The City provides entertainment when entertainers are available, just like other entertainment providers. CR 36, Answer to Interrogatory #8.

B. PROCEDURAL BACKGROUND.

A complaint was filed on June 21, 1989 by Petitioner and MICHAEL J. SECTER (hereinafter "Secter"), as campaign manager for Citizens for Bob Zimmerman, naming as Defendants NORTHWESTERN MUTUAL LIFE, BISHOP SQUARE MANAGEMENT, FRANK F. FASI, in his capacity as Mayor of the City and County of Honolulu, the CITY AND COUNTY OF HONOLULU, and DOUGLAS G. GIBB, in his capacity as Chief of Police of the Honolulu Police Department. The Complaint alleged civil rights violations under 42 U.S.C. Section 1983, a conspiracy to violate Plaintiffs' constitutional rights under 42 U.S.C. Section 1985, and various pendant state tort claims. CR 1:1-18. Secter was later dismissed from the action. CR 124.

Discovery was conducted by all parties. Numerous motions were made. CR 76; CR 97:3-6. Final

judgment was filed on May 14, 1991 in favor of Defendants, and against Petitioner and Secter. CR 153:1-2. The present Notice of Appeal was filed on April 23, 1991. CR 147.

REASONS WHY THE WRIT SHOULD BE DENIED

A. INTRODUCTION - SUMMARY OF ARGUMENT

First, this case must be placed in proper perspective. It is well-established that in a 42 U.S.C. Section 1983 action alleging a violation of First Amendment rights, the framework for analysis is as follows. The reviewing court must first determine if there is "state action." This is a jurisdictional prerequisite. This finding is necessary in order to satisfy the "under color of state law" requirement in Section 1983 and the same requirement in Fourteenth Amendment, by which the First Amendment is applicable to states. In other words, only a "state," not a private party, must abridge constitutional rights to support a Section 1983 action. *See, e.g., Collins v. Womencare*, 878 F.2d 1145, 1148 *cert. denied*, 110 U.S. 1990 (9th Cir. 1989); *Howerton v. Gabica*, 708 F.2d 1145, 1148 (9th Cir. 1983).

Next, if there is "state action" and the court has jurisdiction over the claims, the court must next determine if the area involved is a "public forum," where the government's right to regulate expression can be restricted. *See, e.g., Cornelius v. NAACP Legal Defense Fund*, 473 U.S. 788, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985). Obviously, if the property involved is private property, and it is neither controlled nor regulated by the

government, a "state action" and "public forum" analysis does not apply.

Finally, even if there is "state action" and a "public forum," government regulations of speech can still be upheld if reasonable; i.e., "narrowly tailored" to meet the government's interests without being the "least restrictive or least intrusive means of doing so." *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 798, 105 L. Ed. 2d 661, 680, 109 S. Ct. 2746, 2757 (1989).

Against this background, it is clear that Petitioner's arguments against the City Defendants have no merit.

First, there was no "state action," the crucial requirement for a 42 U.S.C. Section 1983 claim. Both the property and the handbilling rules involved were private.

It is also well-established that where the expressive activity takes place on private property there can be no "state action." Even if the private property is open for public access, as in a shopping center or an office and shopping complex, as is the case here, the First Amendment does not apply, and the private landowner's rules governing the use of the complex are not considered "state action." *See Lloyd Corporation, Ltd. v. Tanner*, 407 U.S. 551, 33 L. Ed. 2d 131, 92 S. Ct. 2219 (1972); *Hudgens v. NLRB*, 424 U.S. 507, 47 L. Ed. 2d 196, 96 S. Ct. 1029 (1976). Without "state action," there can also be no "public forum."

This is particularly true where not only is the rule forbidding political or religious solicitation privately promulgated and enforced, as is the case here, but where the rule has been applied and enforced since the inception of the private commercial project in a uniform and evenhanded manner. *Intern. Society for Krishna Consciousness v. Reber*, 454 F. Supp. 1385 (Cal. 1978).

So, Petitioner's case fails from its inception.

Second, even if there were "state action" or a "public forum" here, the City Defendants would not be liable because the police had "probable cause" to believe the arrest was valid.

At best, the First Amendment concepts here are unclear. In order for the police to determine that a privately owned and privately operated high-rise office and commercial complex in downtown Honolulu was a "public forum" and not like a privately owned shopping mall, the police would have to be familiar with legal concepts far beyond their training. Police officers are simply not expected to understand the legal complexities involved in determining First Amendment concepts like "state action" or "public forum." *See, e.g., Radich v. Goode*, 886 F.2d 1391, 1398 (3d Cir. 1989); *Saldana v. Garza*, 684 F.2d 1159, 1165 (5th Cir. 1982); *cert. denied,* 460 U.S. 1012 (1983).

As far as a reasonable police officer was concerned, there was "probable cause" for a trespass arrest. Therefore, if the individual police officers had "probable cause" to believe that a trespass had occurred and a citizen's arrest was warranted as the courts below have clearly found, then City Defendants are not liable. *See City of Los Angeles v. Heller*, 475 U.S. 796, 89 L. Ed. 2d 806, 106 S. Ct. 1571 (1986). (If police officers acted constitutionally, there can be no further Section 1983 claim against a municipality or its officers.)

B. THE WRIT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION APPROPRIATE FOR REVIEW BY THIS COURT SINCE THERE IS NO CONFLICT BETWEEN THIS DECISION AND APPLICABLE UNITED STATES SUPREME COURT PRECEDENTS.

1. Because Petitioner's Handbilling Activity Occurred On The Premises Of A Privately Owned And Controlled Commercial And Office Complex, The Ninth Circuit Court Properly Held That Petitioner's First Amendment Rights Were Not Implicated. Because Privately Owned Property Was Involved, There Is No Inconsistency With This Court's Recent Decision In *ISKCON v. Lee*, ___ U.S. ___, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992).

At the outset, Petitioner's petition for writ of certiorari must be dismissed because it presents no substantial federal issues for decision by this Court. The Ninth Circuit decision is amply supported by precedent. It is simply not in conflict with any decisions by this Court.

For example, in Points 1 and 2 in Petitioner's "Reasons for Granting Petition" (hereinafter "Reasons"), Petitioner argues that the "constitutional issues of free speech and warrantless arrest and seizure in public fora" are of "fundamental importance" and that his arrest was inconsistent with "long-standing precedent of the U.S. Supreme Court." (Petition at 14, 18).

However, it is axiomatic; in order to provide a basis for granting a writ of certiorari, Petitioner must demonstrate a clear, direct and irreconcilable conflict

between the court of appeals decision and applicable United States Supreme Court decisions. Mere inconsistency *in dicta* or in general principles utilized is not enough. *See, e.g., Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 47 L. Ed. 712 (1923).

ISKCON v. Lee, ____ U.S. ____, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992), is the case upon which Petitioner now primarily relies to demonstrate an inconsistency between the Ninth Circuit decision below and Supreme Court precedent. However, in that case, the airport premises at issue were publicly owned and operated. In this case, privately owned and controlled premises are involved. Therefore, no "state action" or "public forum" is possible. The *ISKCON v. Lee* case is clearly distinguishable from this case.

Furthermore, in *ISKCON v. Lee*, in spite of public ownership and open public areas, this Court nevertheless held that the municipal airport there was still not a "public forum" and never had been. In other words, the government had never consented to the use of municipal airports as soap boxes for political or religious advocacy. No public forum was involved.

Moreover, because airports were never primarily intended to be places for political or religious expression or picketing or mass public demonstrations and rallies, the Court held that the government's ban on religious solicitation was reasonable, in spite of the tremendous public traffic that passes through airport premises. This means that even the holding of the *Lee* case is inconsistent with Petitioner's argument. As this Court stated:

> The inconvenience to passengers and the burdens on Port Authority officials flowing from solicitation activity may seem

> small, but viewed against the fact that 'pedestrian congestion is one of the greatest problems facing the three terminals,' 925 F.2d at 582, the Port Authority could reasonably worry that even such incremental effects would prove quite disruptive. . . . As a result, we conclude that the solicitation ban is reasonable.
>
> For the foregoing reasons, the judgment of the court of Appeals sustaining the ban on solicitation in Port Authority terminals is affirmed. (emphasis added).

In addition, in a fit of zeal to support his arguments, Petitioner has perhaps intentionally misquoted the Court. *See* Petitioner's Reasons at 21-22. The Court, in the *ISKCON v. Lee* case, stated that "streets and parks . . . have immemorially been held in trust for the use of the public." *See* 120 L. Ed. 2d at 550. Petitioner has embellished this quote. He added the following underlined phrase—"streets and parks, regardless of where title may reside . . . have immemorially been held in trust for use of the public." He is, of course, suggesting that privately owned parks may still be public fora.

But, if this Court were to review the *Hague v. Committee For Industrial Organization* opinion, 307 U.S. 496, 83 L. Ed. 1423 (1939), where this language is actually found, it will find that the above-mentioned reference to "where title may reside" is not a reference to private property as Petitioner is hoping the Court will believe.

Instead, by using this phrase, the Court was merely observing that title to or control over the municipal park at issue there either resided in the state

legislature or in the municipality. So, in either case, in *Hague*, public, not private, ownership was involved. It is a far cry from the situation here, where both property ownership and control is private. Therefore, this Supreme Court precedent does not help Petitioner either.

In fact, in *ISKCON v. Lee*, the Court specifically noted that privately owned parks could be developed banning speech activity. These parks are not public fora, unlike publicly held parks—the precise point City Defendants are making here. The Court stated:

> Petitioner attempts to circumvent the history and practice governing airport activity by pointing our attention to the variety of speech activity that it claims historically occurred at various 'transportation nodes' . . . we think such evidence is of little import for two reasons. First, much of the evidence is irrelevant to a public fora analysis, because sites such as bus and rail terminals traditionally have private ownership. . . [For example], [t]he development of privately owned parks that ban speech activity would not change the public fora status of publicly held parks. But the reverse is also true. The practices of privately held transportation centers do not bear on the government's regulatory authority over a publicly owned airport.

Id. at 551-52.

Therefore, from a First Amendment or "public forum" standpoint, as this Court itself has repeatedly held, only publicly owned and controlled property involves "state action" and may be a "public forum." But, privately owned and controlled property, whether used

as a park or otherwise, as is at issue here, does not.

Consequently, Petitioner's request for certiorari should be denied.

2. The Writ Should Be Denied Since Privately Owned And Controlled Property Is Involved. The Public Areas Of A Privately Owned Office And Commercial Complex Are Directly Analogous To A Privately Owned Shopping Mall, Rather Than To A Publicly Owned Park, As The Ninth Circuit Correctly Found. There Is No Reason To Reverse Applicable United States Supreme Court Precedents.

Since it follows from the discussion above that this case was correctly decided, there is no reason for review or to review *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), or *Hudgens v. NLRB*, 424 U.S. 507 (1972), as Petitioner is requesting in Points 6 and 10 of his Reasons. *See* Petition at 46, 55. The public or open areas of a privately owned shopping mall or commercial and office complex, which are privately regulated and controlled, are simply not a public forum for expressive activity, as this Court has repeatedly held.

Moreover, even if a public forum was involved, the private security at the Bishop Square Complex imposed reasonable "time, place and manner" restrictions when Petitioner was asked to move to the public sidewalk that surrounded the open area just a few feet away. *See, e.g., United States v. Grace*, 461 U.S. 171 75 L. Ed. 2d. 736 (1983).

The writ of certiorari should be denied on this basis as well.

C. THE WRIT SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT WITH APPLICABLE CIRCUIT COURT OF APPEALS PRECEDENT. THE CASES RELIED ON BY PETITIONER ARE INAPPOSITE. FURTHERMORE, HIS FACT-BASED ARGUMENTS ARE NOT AN APPROPRIATE SUBJECT FOR REVIEW.

Next, in Points 3 and 6 of his Reasons, Petitioner argues that the decision of the Ninth Circuit Court conflicts with precedent established by other courts of appeal. *See* Petition at 31, 46. He specifically refers to *Edwards v. Maryland State Fair and Agr. Soc.*, 628 F.2d 282 (4th Cir. 1980), and *Hynes v. Metropolitan Government of Nashville*, 667 F.2d 549 (6th Cir. 1982).

This argument is also incorrect.

Again, Petitioner's starting point for analysis is wrong. These cases are also clearly distinguishable from the instant case. Both these cases involve state fairs, where, again, publicly owned property, controlled by public or quasi-public entities, and "state action" was clearly involved. In *Edwards*, the Maryland fairgrounds at Timonium is publicly owned. The fair is run by a quasi-public corporation established and funded by the Maryland legislature and the state police patrol and enforce the rules there. Similarly, in *Hynes*, the county fair on the county fairgrounds was involved.

These cases simply cannot be compared, as the Ninth Circuit correctly found, to the high-rise office and commercial property at issue here, which is owned by a private landowner, Northwestern, and operated by a private property manager, Bishop Square, in downtown Honolulu.

Moreover, the open space or "Tamarind Park" was never dedicated to the City as a public park. This prime downtown location was considered far too valuable to deed to the City. It remained merely landscaped "open space" for a private commercial complex.

Also, the open area was never the "exclusive political preserve" of the Mayor, as Petitioner has suggested. The City merely provided entertainment infrequently there on "Aloha Fridays." As Petitioner readily admits, the Mayor's banner merely stated that it was a "Mayor's Aloha Friday Concert." Entertainment, not political expression, was provided. In addition, the entertainers donated or provided free services, contrary to Petitioner's arguments and were not paid by the City.

The Bishop Square property managers also applied their handbilling rule evenhandedly. City workers passing out programs were asked to stop and did.

Petitioner did not.

So, far from being a case with far-reaching consequences and general applicability, as Petitioner argues, this instead is rather the melancholy tale of a low-budget politician who could not generate sufficient funds for a single mundane television commercial, but who had to rely instead solely on sensationalism and confrontation to get media attention.

It is a "one-of-a-kind" situation, unusual even for Hawaii, and certainly not appropriate for Supreme Court review.

In addition, there is no reason to hold that a private commercial complex should be treated like the functional equivalent of a public park anyway, forcing the private owners to use their property like a state fair or public street. The owners have been careful here to promulgate and enforce rules to maintain an atmosphere

of dignity and restraint, free from the burden of peddlers, sidewalk hawkers and politicians.

At most, public entertainment is provided. There is no evidence of any political or religious solicitation. This kind of solicitation has been uniformly banned since the inception of the complex.

Moreover, this part of Petitioner's writ is entirely fact-based. This Court has repeatedly stated that it will not "ordinarily grant certiorari to review judgments based solely on questions of fact," *NLRB v. Waterman Steamship Corp.*, 309 U.S. 206, 208, 84 L. Ed. 704, 706 (1940), and that it will "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 69 L. Ed. 925, 926 (1925).

D. THE WRIT SHOULD BE DENIED. PETITIONER'S RELIANCE ON THE "PUBLIC FUNCTION" DOCTRINE IS MISPLACED. IT HAS BEEN OVERRULED. MOREOVER, THERE IS NO REASON TO REVIEW STATE PRECEDENTS HERE, SINCE THEY PRESENT NO FUNDAMENTAL FEDERAL QUESTIONS FOR THIS COURT TO REVIEW.

Moreover, Petitioner's reliance on the "public function" doctrine in Point 4 of the Reasons is entirely misplaced. *See* Petition at 38. Private property does not become a "public forum" or the functional equivalent of a public park, merely because it is open to the public, as had been held in *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 20 L. Ed. 2d 603 (1968). In *Hudgens v. NLRB*, 424 U.S. at 518, the Court specifically held that "[t]he rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd*

case . . . the ultimate holding in *Lloyd* amounted to a total rejection of the holding in *Logan Valley* . . ."

Logan Valley is no longer sound law.

Next, Petitioner's reliance in Point 5 of the Reasons on State Supreme Court precedent, such as *State v. Furuyama*, 54 Haw. 109, 637 P.2d 1095 (1981), and *Estes v. Kapiolani Hospital*, 71 Haw. 190 787 P.2d 216 (1990), is similarly misplaced.

It is not this Court's function to review state law precedents, no matter how interesting they may be. The Ninth Circuit Court adequately disposed of the state law arguments.

E. THE WRIT MUST BE DENIED. PETITIONER'S REMAINING ARGUMENTS ARE ALL FACT-BASED AND ALSO INAPPROPRIATE FOR REVIEW.

Petitioner's Point 7 on additional discovery and Point 8 on recusal are fact-based inquiries of no general applicability, presenting no federal questions worthy of review by this eminent court. *See* Petition at 49, 53.

Petitioner's Point 9 requesting review of the state torts at issue here is also inappropriate and does not merit further discussion. *See* Petition at 54.

The writ should be denied on these grounds as well.

F. THE WRIT MUST BE DENIED. EVEN IF THERE WAS A CONSTITUTIONAL DEFECT IN PETITIONER'S ARREST, THE NINTH CIRCUIT PROPERLY DISMISSED CITY DEFENDANTS SINCE THERE WAS "PROBABLE CAUSE" FOR THE TRESPASS ARREST.

Finally, and perhaps most importantly, even if there was a constitutional defect in the arrest, it does not change the result as to City Defendants. Police officers are not expected to understand the legal complexities involved in determining the existence of "state action" or a "public forum" or to assess these complexities in the field. *See Radich v. Goode*, 886 F.2d 1391, 1398 (3d Cir. 1989)("[W]e cannot impose upon a police officer or a city official authorizing the arrest policy the duty to correctly predict how a court will answer this unresolved and complex legal issue."); *Saldana v. Garza*, 684 F.2d 1159, 1165 (5th Cir. 1982), *cert. denied*, 450 U.S. 1012 (1983) (Police officers cannot be held to . . . a legal scholar's expertise in constitutional law.")

The record is clear that the police officers merely took Petitioner into custody after being called by the Security at Bishop Square after the citizen's arrest for trespass. From the standpoint of the officers, the trespass arrest in open space in the complex just outside the shops and restaurants was no different from a similar arrest in the public areas of a shopping mall. In either event, a patron who refused to leave or abide by the security's rules would be involved.

Therefore, it is clear beyond doubt that the police had "probable cause" for the arrest, as the Ninth Circuit Court found. Therefore, City Defendants are not liable

even if Petitioner prevails in his constitutional arguments.

In *City of Los Angeles v. Heller*, 475 U.S. 796, 89 L. Ed. 2d 806, (per curiam), this Court held that a municipality or its officers cannot be held liable under Section 1983 if the individual employee's actions, which form the basis for the suit, have been determined not to inflict any constitutional injury on the plaintiff.

CONCLUSION

For the reasons above-cited, City Defendants respectfully request that Petitioner's Petition for Writ of Certiorari be denied and that City Defendants be given such other relief as this Honorable Court may deem proper.

DATED: Honolulu, Hawaii, February 17, 1993.

Respectfully submitted,

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No. 92-1251

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1992

ROBERT LEE ZIMMERMAN,

Petitioner,

vs.

NORTHWESTERN MUTUAL
LIFE INSURANCE COMPANY
OF MILWAUKEE, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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February 10, 1993

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STATEMENT OF RELATED CORPORATIONS

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY has no parent company. The following are either subsidiaries or affiliates:

MGIC Investment Corporation

The Grand Avenue Corporation

Regis Group, Inc.

Mall Management Associates nka MMI Realty Services, Inc. dba Bishop Square Management, Inc. has no parent company, subsidiaries or affiliates.

No. 92-1251

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT LEE ZIMMERMAN,

Petitioner,

vs.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY OF MILWAUKEE, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY and MALL MANAGEMENT ASSOCIATES nka MMI REALTY SERVICES, INC., dba BISHOP SQUARE MANAGEMENT, INC., hereinafter collectively referred to as "THE PRIVATE DEFENDANTS" oppose the Petition for Writ of Certiorari

pursuant to which Petitioner seeks review of the Judgment of the Court of Appeals of the Ninth Circuit affirming the United States District Court for the District of Hawaii's Judgment entered in favor of Respondents.

OPINIONS BELOW

The decisions of the United States District Court for the District of Hawaii and the United States Court of Appeals for the Ninth Circuit have not been officially reported but are set forth in the Appendix to the Petition for Writ of Certiorari.

The Judgment of the Court of Appeals was entered on August 21, 1992, Petitioner's App. 63-64, and the Petition for Rehearing was denied on October 20, 1992 (Petitioner's App. 61-62). This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether or not the Ninth Circuit Court of Appeals correctly affirmed the Judgment entered by the United States District Court for the District of Hawaii in favor of Respondents and against Petitioner. More particularly, the issues may be stated as follows:

1. Did the Ninth Circuit properly rule that there was no State action or constitutional violation under 42 U.S.C. § 1983?

2. Did the Ninth Circuit properly rule that Zimmerman is not a member of a class protected by 42 U.S.C. § 1985?

3. Did the Ninth Circuit properly conclude that it was not an abuse of discretion for the District

Court to have denied Mr. Zimmerman's Motion to Amend Original Complaint?

4. Did the Ninth Circuit correctly determine that the District Court did not abuse its discretion by denying Mr. Zimmerman's Motion to Compel Discovery?

5. Did the Ninth Circuit correctly determine that the District Court did not abuse its discretion by refusing to recuse the District Court Judge and Magistrate?

STATEMENT OF THE CASE

Sup. Ct. R. 15 requires that Respondents point out any perceived misstatements in the Petition in their brief in opposition. Mr. Zimmerman's Petition, however, consists of conclusory argument and his recitation of facts bears no resemblance to the

record that the District Court had before it at the time it ruled on the Private Defendants' Motion for Partial Summary Judgment. The following summary sets forth the procedural background of the case and the uncontradicted record before the District Court.

A. Procedural Background

The Complaint in this matter was filed on June 21, 1989. (R. 1) The Complaint was brought against The Private Defendants as well as the Mayor and other City Defendants alleging violation of civil rights under 42 U.S.C. § 1983 and conspirary to violate the constitutional rights under 42 U.S.C. § 1985. (R. 1:1-18) In addition, various pendent State tort and constitutional claims were

asserted. (R. 1:1-18) Mr. Zimmerman was initially represented by counsel who completed certain discovery, including requests for answers to interrogatories and production of documents on the defendants. The case was pending for more than one year before The Private Defendants filed a Motion for Partial Summary Judgment as to the Federal Claims on July 27, 1990. (R. 36:1-47) Mr. Zimmerman filed a Counter-Motion for Partial Summary Judgment on September 5, 1990. (R. 40:1-29; 39:1-43) The arguments on the Motions were held on September 24, 1990 at which time The Private Defendants' Motion was granted. (R. 49) Subsequently, the District Court also granted the City Defendants' Motion for Partial Summary

Judgment and dismissed the pendent State claims. (R. 148) In addition to submitting his own Counter-Motion for Partial Summary Judgment and thereby acknowledging that there remained no issues of fact to be resolved, Mr. Zimmerman at no time submitted an affidavit under Fed. R. Civ. P. 56(f), indicating that additional time for discovery was necessary in order to submit opposing affidavits. Moreover, Mr. Zimmerman did not, in his argument at any time, contend that he needed to do additional deposition discovery. It was only after the partial summary judgment had been awarded to The Private Defendants that Mr. Zimmerman first contended that additional discovery was necessary.

B. Undisputed Facts Presented To The District Court

The undisputed facts as shown by appropriate affidavits and interrogatory answers demonstrated that the Bishop Square Complex is located in downtown Honolulu and includes the entire block bordered by Bishop Street, King Street, Alakea Street and Hotel Street. (R. 36:2) The Hotel Street/Alakea Street corner is occupied by street level commercial space and a multi-story above ground parking garage. The Bishop Street/King Street corner is occupied by a multi-level underground parking structure, the roof of which is at street level. The underground parking structure roof has been landscaped with plantings and numerous pools

which border the walkways leading from the Bishop Street/King Street corner to the main entrances of the office towers and the ground floor commercial spaces. The Bishop Street/King Street corner of the Bishop Square Complex is known as Tamarind Park. (R. 36:3)

The Bishop Street/King Street corner of the block had never been devoted to public assembly or public purposes historically, and it was not until the last phase of the construction of the Bishop Square Complex in 1983 that the public had general access to the corner. (R. 36:3)

The entire Bishop Square Complex, on July 22, 1988, was owned by Northwestern which paid the usual property taxes for the entire area

including the street level portion referred to as Tamarind Park. (R. 36:3) The private nature of the complex, including Tamarind Park, was clearly indicated through a series of markers embedded in the concrete walkways at the perimeter of the Bishop Square Complex. (R. 36:4) While the public had access through Tamarind Park to the commercial, office and retail tenants located in the Bishop Square Complex, Northwestern had at no time dedicated Tamarind Park or any portion of the Bishop Square Complex to open space or public recreational uses. (R. 36:4)

Bishop Square, pursuant to a contract with Northwestern, managed the day to day operation of the Bishop Square Complex. (R. 36:4) Among its

responsibilities was the enforcement of the Regulations Pertaining To The Use Of The Tamarind Park/Bishop Square. (R. 36:4) While the public had access to Tamarind Park, regulations as to the public's use of the park had been developed and enforced by Northwestrn and Bishop Square to ensure that Tamarind Park projected an atmosphere which would enhance the value of the commercial and office spaces in the Bishop Square Complex as well as to portray the relaxed, quiet, carefree image deemed by the owner to be suitable for Tamarind Park. (R. 36:4)

Distributing handouts was prohibited at Tamarind Park. This rule was intended to minimize potential annoyance to persons

entering the Bishop Square Complex, reduce the potential for disorder, minimize litter, and maintain a controlled, carefree and relaxed environment. (R. 36:5) The rule against distributing handouts was non-discriminatory, and precluded all distribution on the privately owned premises. (R. 36:5) The rule was applied even-handedly to all those who were observed distributing handbills at Tamarind Park. (R. 36:5)

Tamarind Park, on July 22, 1988, was controlled, maintained and managed exclusively by Northwestern and Bishop Square. (R. 36:5) The City did not participate financially or otherwise in any respect concerning creation of rules and regulations for the premises or in its maintenance or

management. (R. 36:5) Tamarind Park was not a "public park" as defined in the Revised Ordinances of Honolulu, Art. 14, Sec. 13-14.1 (1983 ed.). (Respondents App. at A-3) (R. 36:5).

Moreover, the undisputed facts as demonstrated through appropriate affidavits submitted in support of Respondents' Motion for Partial Summary Judgment clearly showed that groups and organizations were allowed to use Tamarind Park for special events if an application were submitted describing the activity as being consistent with the regulations and compatible with use of the area by Bishop Square tenants and those transacting business with the tenants. (R. 45) Use of the Bishop Square Complex was limited to

charitable or non-profit groups and those representing specific non-partisan community interests. The regulations pertaining to the use of Tamarind Park/Bishop Square had been strictly adhered to since the park's opening in 1983. Neither handbilling nor political group activity has been permitted in Tamarind Park at any time. Since 1983, many special events have taken place in Tamarind Park. Many of these were sponsored by the City and County of Honolulu. Many others were sponsored by private groups and individuals having absolutely no connection with the City and County of Honolulu. Mr. Zimmerman was free to apply to Bishop Square for permission to sponsor special events at Tamarind Park just as the City and

County of Honolulu and other groups and organizations and individuals have applied for permission to sponsor special events. The Respondents do not co-sponsor events taking place at Tamarind Park. Bishop Square's role on behalf of Northwestern was merely to review and approve applications which were consistent with the policies of maintaining the desired environment consistent with the regulations and compatible with the use of the area by Bishop Square tenants and those transacting business with the tenants. The regulations against distributing handbills were not aimed at political candidates but were applied across the board to distribution of commercial literature and promotional literature. The

Respondents had no special arrangements with the City and County of Honolulu. (R. 45)

The arrest of Mr. Zimmerman on July 22, 1988 was made because of Mr. Zimmerman's refusing to stop distributing handbills and contravention of regulations applicable to the use of property. The arrest was not pre-arranged, planned or coordinated but accomplished in the only manner available to protect the owner's property rights. (R. 45)

Banners are permitted in connection with the approved special events at Tamarind Park. The only requirement is that Bishop Square approve the banners as being tasteful and professional. Mr. Zimmerman was

never barred from Tamarind Park. He has, at all times, been free to apply to sponsor special events at Tamarind Park and use tasteful, professional banners. He has free access to the premises to talk to whomever he wishes on Bishop Square Complex premises. (R. 45)

In 1988, Zimmerman was a candidate for the United States Senate in the Democratic Primary Election. (R. 36:5) He was running for the seat then held by Senator Matsunaga. (R. 36:5) Zimmerman had become a resident of the State of Hawaii in 1986 after moving from New York. (R. 36:5) He believed that Senator Matsunaga would win the Democratic Primary but was counting on Senator Matsunaga's passing away before the general

election. (R. 36:5) He believed that if he came in second in the primary, he automatically would be placed on the general election ballot as the Democratic nominee for the Senate if Senator Matsunaga passed away before the general election. (R. 36:6)

In the spring and summer of 1988, Zimmerman or his campaign workers came upon the Bishop Square Complex premises to distribute handouts or sell materials. (R. 36:6) On at least eight occasions, Zimmerman or his campaign workers had been present on the Bishop Square Complex premises distributing handouts in violation of Tamarind Park Regulations. They were asked to comply with the rules and regulations or to leave the premises. (R. 36:6)

On two occasions, written trespass warnings were issued by Bishop Square. (R. 36:6-7) One warning was issued to Zimmerman on April 15, 1988 and the second warning to Michael Secter, the campaign manager for Citizens for Zimmerman. Secter's warning was issued on July 1, 1988. (R. 36-7)

Zimmerman, along with several campaign workers, again appeared on the Bishop Square premises on July 22, 1988. (R. 36:7) At that time, Zimmerman walked through the Tamarind Park area distributing handouts. He approached George Krater, the head of security, who was in the park area. (R. 36:7) Mr. Krater asked Zimmerman to stop distributing his handouts or to move to the nearby public

sidewalks. (R. 36:7) Zimmerman refused. (R. 36:7) The police were then summoned and a "citizen's arrest" was made by security officer Charles Hill, an employee of Bishop Square. (R. 36:7) The police took custody of Zimmerman and Zimmerman was charged with criminal trespass. (R. 36:7) Secter voluntarily left the premises and was not arrested. (R. 36:7)

SUMMARY OF THE ARGUMENT

The Circuit Court correctly ruled that there were no genuine issues of fact presented to the District Court and that the Private Defendants were entitled to judgment as a matter of law. The Court correctly found that the property in question, The Bishop Square Complex/Tamarind Park, was not a

public forum and therefore it did not implicate Petitioner's First Amendment rights. The Court correctly analogized the situation to those cases decided by this Court in which anti-handbilling regulations applicable to private shopping centers were upheld notwithstanding First Amendment challenge.

The Circuit Court also correctly found that no genuine issue of material fact was presented with regard to Petitioner's assertion that all or a portion of the Bishop Square Complex had at any time been dedicated to public use.

Moreover, the Circuit Court correctly determined that no genuine issues of material fact existed and that the Private Defendants had

probable cause to make a citizen's arrest. Even if the citizen's arrest constituted some type of state action, there was no evidence of a constitutional violation given the private nature of the property and the fact that it was not a public forum.

The Circuit Court also correctly determined that Petitioner's 42 U.S.C. § 1985 conspiracy claims failed as a matter of law as Petitioner created no genuine issue of material fact to show class based invidious discrimination.

The Circuit Court also properly concluded that the District Court had not abused its discretion in denying Petitioner's untimely request for discovery following the District Court's granting the Private

Defendants' Motion for Partial Summary Judgment. Also, the Circuit Court properly ruled that Mr. Zimmerman had abandoned the issue of recusal, on appeal, when he presented no argument on the issue. Moreover, the Circuit Court appropriately found that, upon resolution of all Federal claims, the District Court properly dismissed for lack of jurisdiction Mr. Zimmerman's pendent State constitutional tort claims.

The Circuit Court's decision is not in conflict with other decisions of this Court, other Circuit Courts, or the Hawaii Supreme Court and therefore the Petition should be denied.

ARGUMENT

The petition should be denied because the Ninth Circuit's decision affirming the District Court's disposition of the case was correct, and there is no dispute or conflict between prior decisions of this Court, other Circuit Courts of Appeal or the Hawaii Supreme Court which would justify this Court exercising its discretion to review the Ninth Circuit's decision.

A. There is No Conflict Between The Decision of The Court of Appeals and The Decisions of This Court.

The undisputed facts in the case showed that the property in question, the Bishop Square Complex, was privately owned. Therefore, the Ninth Circuit appropriately relied on

this Court's decisions holding that the public nature of private business premises does not require burdening such property with First Amendment protection reserved for government owned property. See Lloyd Corporation Ltd. v. Tanner, 407 U.S. 551, (1972) and Hudgens v. NLRB, 424 U.S. 507 (1976). Mr. Zimmerman's assertion that the Ninth Circuit's decision is contrary to prior decisions of this Court is simply untrue. Mr. Zimmerman cites Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939); International Society for Krishna Consciousness Inc. v. Lee, 112 S. Ct. 2701 (1992); United States v. Grace, 461 U.S. 171 (1983), and Perry Education Assn. v. Perry Local Educator's Assn., 460 U.S. 37 (1983).

All of these cases involved regulation of public property or enforcement of City ordinances or other executive orders. For example, Hague dealt with a City ordinance forbidding the leasing of any halls without a permit from the Chief of Police for a public meeting. International Society for Krishna Consciousness Inc. v. Lee dealt with the question of "... whether an airport terminal operated by a public authority is a public forum and whether a regulation prohibiting solicitation in the interior of an airport terminal violates the First Amendment." Lee, 112 S. Ct. at 2703. In United States v. Grace, the Court addressed the First Amendment implications of a Federal statute which had been used to

prohibit leafletting on the publicly owned sidewalks and stairways in front of the United States Supreme Court. In Perry Education Assn. v. Perry Local Educators' Assn., the Court dealt with First Amendment issues arising out of the use of a public school mail system. None of the other cases cited by Petitioner involved privately owned and regulated property.

In Evans v. Newton, 382 U.S. 296 (1966), a tract of land was willed to the City, as a park for white people, to be controlled by a white Board of Managers. After the city desegregated the park, the individual managers brought suit in state court seeking the city's removal as trustee and the appointment of private

trustees to enforce the racial limitations of the Will. The Court held that the services rendered by that park were municipal in nature, based on its finding that the park had traditionally been under municipal control and maintenance. In fact, the Court noted that the Park had always been swept, manicured, watered, patrolled, and maintained by the city as a public facility, even after the removal of the city as trustee. The court concluded that the municipality remained entwined in the management or control of the park, thus remaining subject to the restraints of the Fourteenth Amendment.

In International Society for Krishna Consciousness, Inc. v. Lee, Justice Rehnquist specifically noted

that First Amendment analysis in relation to publicly owned property is irrelevant to privately owned property: "The development of privately owned parks that ban speech activity would not change the public fora status of publicly held parks. But the reverse is also true. The practices of privately held transportation centers do not bear on the government's regulatory authority over a publicly owned airport." Lee, 112 S. Ct. at 2707.

In United States v. Kokinda, 497 U.S. 720, 110 S. Ct. 3115 (1990), Justice O'Connor distinguished publicly owned from privately owned property in connection with a First Amendment analysis relating to a federally owned postal sidewalk.

Justice O'Connor stated:

> The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business ....

Id., 497 U.S. at ____, 110 S. Ct. at 3119.

There is no inconsistency between these decisions cited by Mr. Zimmerman and the Circuit Court's disposition of this case. The Circuit Court correctly followed the most closely analogous Supreme Court decisions, namely those dealing with First Amendment issues in the context of privately owned shopping centers.

B. There is No Conflict Between The Circuit Court's Decision and The Decision of Any Other United States Court of Appeals on The Same Matter

The argument set forth in the Petition at pages 31 through 37

discloses no conflict between the decisions of any other Circuit Courts and the decision by the Ninth Circuit in this case. The only cases cited by Mr. Zimmerman, Hines v. Metropolitan Government of Nashville and Davidson County, 667 F.2d 549 (6th Cir. 1982) and Edwards v. Maryland State Farm and Agricultural Society, Inc., 628 F.2d 282 (4th Cir. 1980), dealt exclusively with First Amendment issues arising in the context of State sponsored and run farm fairs. These cases have nothing to do with private parks. None of the factual materials cited by Mr. Zimmerman in his arguments on pages 34 through 37 were supported by proper affidavit or otherwise contained in the record upon which the Respondents' Motion for Partial Summary Judgment

were decided by the District Court.

C. The Ninth Circuit Decision Does Not Conflict With Any of This Court's Decisions Applying A Public Function Analysis to 1983 Claims

Mr. Zimmerman, at pages 38-39 of the Petition cites Terry v. Adams, 345 U.S. 461 (1953) and Marsh v. Alabama, 326 U.S. 501 (1946) as support for his argument that the Circuit Court's decision in this case is in conflict with Supreme Court decisions applying a public function doctrine. Terry dealt with racial discrimination in voting practices in Texas and Marsh v. Alabama, of course, is the company town case which was aptly distinguished by this Court in its shopping center cases, Hudgens v. NLRB, 424 U.S. 507 (1976) and Lloyd v. Tanner, 47 U.S. 551 (1972). Mr.

Zimmerman presented no facts to the District Court at the time of the hearing on Respondents' Motion for Partial Summary Judgment which in any way demonstrated that any governmental body had transferred some public function to the Private Defendants or that the activity being performed by the Private Defendants was "traditionally the exclusive prerogative of the State." Randall-Baker v. Kohn, 457 U.S. 830, 842 (1982). Public function analysis centers upon whether the private entity has exercised some power delegated to it by the Government which is traditionally associated with sovereignty. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

Tamarind Park, contrary to Mr. Zimmerman's assertion, was never dedicated to public use and has never been operated in a municipal or public way. The uncontroverted facts show that it has, since its opening in 1983, been managed under the rules and regulations which were applied to Mr. Zimmerman. This Court has clearly stated in Lloyd Corporation, 407 U.S. at 569, that property does not "lose its private character merely because the public is generally invited to use it for designated purposes." The Circuit Court correctly noted that, even in cases of government owned property such as postal walkways, being open to the public does not by itself establish that such areas must be treated as traditional public fora

under the First Amendment. See Petitioner's Appendix at 70-71 (citing United States v. Kokinda, 110 S. Ct. 3115, 3121 (1990)).

D. The Circuit Court's Decision Does Not Conflict With Any Hawaii Supreme Court Decision With Regard To a Federal Question

In State v. Furuyama, 64 Haw. 109, 637 P.2d 1095 (1981), the Hawaii Supreme Court reviewed the procedures followed by police in making arrests for promoting pornography. Honolulu Police officers dressed as Japanese tourists purchased suspected pornographic materials and then made arrests as the sale and purchase were witnessed by a "partner or assisting officer", State v. Furuyama at 64 Haw. at 112-113. The Furuyama case had nothing to do with citizen's arrests

such as that effected in this case. Moreover, as the Circuit Court correctly found, "Zimmerman presented no evidence demonstrating that probable cause was lacking. Because the arresting party had probable cause to believe that Zimmerman was trespassing, the warrantless arrest did not constitute an infrigement upon any constitutional protected right." See Petitioner's Appendix at 77.

Zimmerman's reference to Estes v. Kapiolani Women's and Children's Medical Center, 71 Haw. 190, 787 P.2d 216, (1990) is also misplaced. In Estes, the Hawaii Supreme Court considered the First Amendment rights of persons entering the Kapiolani Hospital premises to distribute anti-abortion leaflets and to

otherwise express their views. The leafleteers were warned by police that they would be arrested for trespass. The police had been summoned by the hospital after the leafleteers, who had not obtained hospital permission, refused to obey security guards' instructions to leave. In affirming the lower court's dismissal of the injunction action, the Hawaii Supreme Court, in interpreting the Freedom of Speech provisions of the Hawaii Constitution, Article I, Section 4, stated, "Although this provision is not so narrowly read as to preclude only legislative enactments which abridge free speech, still, '[i]t is, of course, a commonplace that the Constitution guarantee of free speech is guaranteed only against the

abridgement by government.' Hudgens v. NLRB, 424 U.S. 507, 513 (1976)." 71 Haw. at 192-3. The Court then analyzed numerous Federal decisions with regard to the type of conduct or circumstances which constitutes State or governmental action in the context of free speech. The Hawaii Supreme Court held that Kapiolani Hospital was not a State agency and that police involvement in enforcing the hospital's rights against trespass did not convert the hospital's actions into State actions. 71 Haw. at 193-194. It is clear from the Court's analysis in Estes that the Hawaii Constitution proscribes only government action, State action, and not private action.

In Estes, the leafleteers also argued that the Hawaii court should interpret the Hawaii Constitution in a manner similar to the California Supreme Court in Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979). The Hawaii Court rejected Pruneyard stating:

> Contrary to the framers of the California Constitution, the framers of our Hawaii Constitution adopted language nearly identical to that of the First Amendment for the protection of free speech. In construing Article I, Section 4 of our Hawaii Constitution, we adopt holdings of the Federal cases construing the First Amendment rights of free speech of our U.S. Constitution which would prohibit appellants from distributing leaflets or otherwise express anti-abortion views on the premises of the hospital.

71 Haw. at 197.

The Hawaii Court endorsed the analysis set forth in Lloyd and Hudgens and rejected application of Marsh to the circumstances presented. Mr. Zimmerman has not demonstrated any conflict between decisions of Federal constitutional law by the Hawaii Supreme Court and the decision on Federal issues by the Circuit Court in this case.

E. Questions Concerning Mr. Zimmerman's Attempt to Amend the Pleadings, Recuse the U.S. District Court Judge and Magistrate, and Seek Review of the Court's Dismissal of Pendent State Claims Do Not Raise Issues of Special Interest or Importance and the Circuit Court's Disposition of These Matters Is Not In Conflict With This Court's Or Any Other Court's Decisions

Mr. Zimmerman's request for review of the Circuit Court's decision

relating to his attempt to amend pleadings, recuse the District Court Judge and Magistrate and his seeking review of the dismissal of pendent State claims does not raise issues of special interest or importance and should be rejected. The Circuit Court reviewed the District Court's decision for abuse of discretion and Mr. Zimmerman cites no cases which conflict with the Circuit Court's decision. (See Petition at 46-60). Absent any showing of conflicting decisions The Private Defendants respectfully assert that review by this Court would be inappropriate.

CONCLUSION

Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

DATED: Honolulu, Hawaii, February 10, 1993.

WILLIAM ALAN BORDNER

Attorney for Respondents
THE NORTHWESTERN MUTUAL
LIFE INSURANCE COMPANY and
MALL MANAGEMENT ASSOCIATES

APPENDIX A

No. 92-1251

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT LEE ZIMMERMAN,

Petitioner,

vs.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY OF MILWAUKEE, ET AL.,

Respondents.

REVISED ORDINANCES OF

HONOLULU, Art. 14

Sec. 13-14.1 (1983 ed.)

THE REVISED ORDINANCES OF HONOLULU 1978 (1983 Edition)

Comprising the Ordinances of the
CITY AND COUNTY OF HONOLULU,
Ordinance No. 3508 through Ordinance No. 83-73
December 31, 1983

PUBLISHED BY AUTHORITY

Effective

MAYOR
EILEEN R. ANDERSON

COUNCIL
PATSY T. MINK, *Chair*

GEORGE G. AKAHANE
MARILYN BORNHORST
LEEDS-WAI DOO
WELCOME S. FAWCETT
DAVID KAHAHU
TOSHIKI MATSUMOTO
TONY NARVAEZ
RUDY PACARRO

Article 13. Sound Vehicles.

(REPEALED by Ord. No. 79-74. See Traffic Code of the City and County of Honolulu 1976, Sec. 15-19.43)

Article 14. Rules And Regulations Relative To The Use Of Public Parks, Playgrounds, Beaches And Other Public Areas.

Sec. 13-14.1. "Public Park" Defined.

"Public park" shall include any park, park roadway, playground, athletic field, beach, beach right-of-way, tennis court, golf course, swimming pool, and other recreation areas and facilities under the control, maintenance and management of the Department of Parks and Recreation. (Sec. 13-18.1, R.O. 1969; Am. Ord. 3920)

Sec. 13-14.2. Park Rules And Regulations.

(a) Within the limits of any public park, it shall be unlawful for any person to:

(1) Willfully or intentionally destroy, damage or injure any property.

(2) Climb onto any tree, except those designated for climbing, or to climb onto any wall, fence, shelter, building, statue, monument or other structure, excluding play apparatus.

(3) Swim, bathe, wade in, or pollute the water of any ornamental pool or fountain.

(4) Throw or dispose of any refuse or waste material, except in receptacles placed therein.

(5) Kindle, build, maintain or use any fire, other than in a grill or brazier.

(6) Annoy, molest, kill, wound, chase, shoot or throw missiles at any animal or bird.

(7) Distribute, post or place any commercial handbill or circular, notice, or other advertising device or matter, except as permitted by the terms of any agreement relating to the use of park property.

(8) Use any surfboard or devices or materials with jagged or rough ends and edges, which are dangerous to surfers, swimmers, or bathers.

(9) Construct or fabricate surfboards.

Supreme Court, U.S.
FILED
FEB 26 1993
OFFICE OF THE CLERK

NO.: 92-1251

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OCTOBER TERM, 1992

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PETITIONER

v.

NORTHWESTERN MUTUAL
LIFE INSURANCE COMPANY
OF MILWAUKEE, ET AL.

RESPONDENTS

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Robert Lee Zimmerman
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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I. INTRODUCTION

Although Petitioner believes that the reasons enumerated in the petition warrant the grant of a writ, Petitioner also believes a brief reply to the opposition raised by Respondents is warranted to correct some of the factual inaccuracies they have introduced.

II. BOTH PUBLIC AND PRIVATE RESPONDENTS HAVE ENTIRELY FAILED TO PRESENT A COHERENT BRIEF IN OPPOSITION

A. Respondents Fail To Raise any Discrepancies Regarding Petitioner's Statement of the Case

The public and private Respondents have entirely avoided

confronting Petitioner's Statement of the Case, not pointing out a single inaccuracy in it. Instead, Respondents have presented their own version of the facts in this case, versions which are entirely anecdotal and unsupported by the record evidence. There is barely a single sentence in the Factual Background (p.2-5) of the private Respondent's Brief In Opposition or in the Undisputed Facts Presented To The District Court (p. 9-20) of the private Respondent's Brief In Opposition that rings true or was established as credible evidence. In section III. below, Petitioner has addressed only some of the more glaring inaccuracies.

B. Respondents Consider the Bill of Rights An Unnecessary Burden

Each Respondent has referred to the First Amendment as a "burden." The public Respondents have gone so far as to call this case "one-of-a-kind" and certainly nothing that our highest Court should trouble with. But Respondents have misunderstood the very basis of our system of law. It is our Constitution and not this case that is "one-of-a-kind." The trivialization of our Constitution by referring to it as a "burden" is a real danger to those who seek its protection.

Respondents have not shown Tamarind Park is not a public

forum: Nor have they presented any legal justification for the warrantless arrest of Petitioner: Nor have they justified their total ban on political speech with anything other than a vague reference to litter and ambiance.

C. Respondents Admit To Participating In A Conspiracy To Injure Petitioner

Surprisingly, in their respective Oppositions each Respondent admits participating in the conspiracy to thwart Petititioner's efforts to conduct a grassroots political campaign. Each has noted at least eight encounters with Petitioner where they sought to deny his campaign

its freedom to speak out on the issues. While Petitioner sought to expose, via leafletting, the incredible breadth and depth of the corrupt practices that have ensnared Hawaii, Respondents, both participants and beneficiaries of many of those corrupt practices, used the state's police power to arrest and otherwise intimidate Petitioner and staffers.

III. GLARING INACCURACIES INTRODUCED IN RESPONDENT'S BRIEFS IN OPPOSITION

A. There Is No Parking Garage In Tamarind Park

In their Oppositions, no longer satisfied with the magical transformation of Tamarind park

into a shopping center, Respondents have now attempted to give the impression that Tamarind Park is a parking garage. Nothing could be further from the truth. Beneath Tamarind there may sit a parking garage, but there is absolutely no access to that garage from Tamarind nor is it visible from Tamarind.

In many cities beneath the parks there may be found subway tunnels, conduits of various sorts, parking garages and even shopping centers. These underground facilities and facilitators in no way transform the nature of what is above to that which is below.

B. There Are No Retail Stores At Tamarind Park

Respondents have also attempted to create the illusion that there are retail stores at Tamarind Park. But, again, this is pure fancy. There are no retail stores in Tamarind Park; they are in the office towers.

C. Tamarind Park Is Not Noticed As Private Property

Private Respondents at p.10 and public Respondents at p. 3 claim that Tamarind is marked as private property. Again, nothing could be further from the truth. In reality, there is nothing inside Tamarind or at its major entrances

announcing that Tamarind is private property.

However, embedded in the public sidewalks abutting the park, where not one passerby in a hundred would see it, much less stop to read it, there are several worn bronze plaques 5 1/2 inches wide and 3 1/2 inches high. In 1/2 and 1/4 inch lettering, these plaques read "Private Property. Permission To Use Revocable At Any Time." The plaques, as randomly embedded in the public sidewalks, give absolutely no indication of what it is that is private property and if taken literally, their placement and message would indicate that the public sidewalk was private

property and that permission to walk on it could be revoked at any time. Not Petitioner but rather the bronze plaques and those who placed them in the public sidewalks are the trespassers.

D. Tamarind Park Was Formally Dedicated To the Public In 1983 and Has Been Used As A Park by the Public Since 1983

Also at p. 10 the private Respondents claim that Tamarind was never dedicated to the public. This untrue statement is totally at odds with the record evidence (a full page newspaper advertisement dedicating Tamarind to the public and its continual, long-term use by the public). Both private and public Respondents readily admit

that Tamarind has been used by the public as a park since 1983, 365 days a year, 24 hours a day.

E. There Is Plenty of Political Activity At Tamarind Park

At p. 14 the private Respondents claim that "Neither handbilling nor political group activity has been permitted in Tamarind Park at any time." This is a very curious statement in that it runs contrary to two important facts. Firstly, the public Respondent's (at p. 15) admit that the Mayor's banner was flying in Tamarind Park and that City employee's were leafletting there at the very same time that Petitioner was arrested there for

distributing copies of our Constitution. It is a curiosity that for the entire six years (from 1983, when Tamarind was dedicated to the public and the Mayor's people took over on Friday afternoon's, to 1988 when the harassment and arrest of Petitioner was initiated) not a single trespass arrest for leafletting was made nor a single warning to city employees to cease their leafletting activities issued. The record evidence amply portrays Tamarind as the Mayor's private political preserve where each Friday afternoon he and the city co-sponsor with the private Respondents a public event, Mayor's

Aloha Friday, an event at which city personnel have openly distributed handbills and have repeatedly done so without any interference from the public or private police.

Secondly, and highly indicative of Respondent's intentional deceits upon this and the lower Courts, the private Respondent's at p. 16-17 state that Petitioner was "...free to apply to sponsor special events at Tamarind..." Such a statement is totally at odds with Respondent's expressed total ban on political activity, as above, and such an offer was never made to Petitioner.

Thirdly, Respondents readily admit that people are free to talk politics at Tamarind until they are blue in the face and often they do. Thus, the ban on political leafletting was nothing more than a sham excuse for harassing and intimidating Petitioner and his campaign staffers. There was never a single citizen complaint regarding Petitioner's campaigning at Tamarind or anywhere else.

F. The Ownership of Tamarind Park By the Private Respondents Was Not Established

At p. 8-12 the private Respondents present a description of Tamarind Park and the surrounding area claiming ownership

thereof, but the record evidence entirely fails to support that claim of ownership with credible evidence of ownership.

G. There Is No Evidence That the Private Respondents Paid Property Taxes For Tamarind Park At the Full Rate or At Any Rate

At page 9 the private Respondents claim to have paid the "usual property taxes for the entire area..." But both public and private Respondents have entirely failed to prove that such taxes were paid, submitting nothing in response to Petitioner's numerous requests for such proof. The "usual" taxes could reasonably be construed to include a lowered tax rate or basc in return for the

public's use of Tamarind as "Public Open Space," indeed, the designation under which Tamarind is recorded at City Hall.

H. Respondent's Free Speech Ban

The Court may be interested in perusing Respondents free speech ban. If so, Petitioner has reproduced it in its entirety as Appendix "A." Please note that the ban, with underlining added by Petitioner, features no date or originator, nor is there any record evidence as to how, when or by whom it was produced or to whom it was promulgated. Petitioner first came upon it buried in certain boilerplate response Respondents

had made to a request for production of documents.

I. JURISDICTION

At page -i- of their Opposition City Respondents have again attempted to mislead this Court. Petitioner had filed for a Rehearing with the Ninth Circuit which was denied on October 20, 1992. Petitioner had clearly sought a Rehearing from the Ninth Circuit (with a suggestion for en banc) and not a Rehearing en banc as suggested by City Respondents.

J. There Is Plenty of State Action In This Case

Petitioner was seized, arrested, detained and imprisoned

by the joint action of the public and private Respondents: That is state action.

Petitioner suffered a significant blow to his political campaign as a result of the conspiratorial joint actions of the public and private Respondents: That is state action.

Petitioner suffered a long prosecution that extended beyond the duration of the political campaign, a prosecution that was dropped on the day of trial without prior notice: That, too, is plenty of state action.

The co-sponsorship of Mayor's Aloha Friday by the public and private Respondents is also state

action as is private Respondent's dedication and operation of Tamarind Park as public open space.

K. Petitioner's Exasperating and Ineffectual Efforts To Gain Fundamental Discovery

At p. 5-7 private Respondents entirely miscast the procedural background of this lawsuit. The Civil Docket Sheets clearly show that Petitioner repeatedly sought fundamental discovery and was denied access to it. And although numerous depositions were requested by Petitioner, none was had, nor was Petitioner allowed even a single amendment to the Original Complaint.

L. There Was No Probable Cause To Arrest

City Respondents argument that there was probable cause to arrest a peaceable political candidate for distributing copies of our Constitution to prospective voters in a downtown park is merely ludicrous. The private Respondents at p. 35 readily admit that a warrant is required before an arrest for the distribution of pornography. But, with or without Hawaii state law that requires a warrant before an arrest where First Amendment rights are implicated, without more, why would any reasonable police officer even consider such an arrest? There are

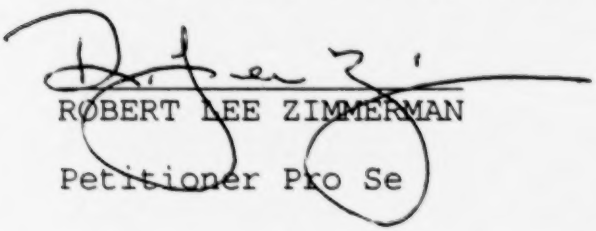
no exigent circumstances and plenty of time to obtain a warrant.

Under our Constituion those who would seize a person for peaceably distributing it to prospective voters are lawbreakers extraordinar.

IV. CONCLUSION

For the reasons stated in the Petition as supplemented by this Reply Petitioner respectfully requests that the Court grant the Petition for Writ of Certiorari.

DATED: February 26, 1993



ROBERT LEE ZIMMERMAN

Petitioner Pro Se

APPENDIX "A"

REGULATIONS PERTAINING TO THE

USE OF TAMARIND PARK/BISHOP SQUARE

1. The use of the Park can be authorized only by approved application available in the Bishop Square Management, Inc. office.

2. Groups using the Park area are assigned to designated locations only, and at days and times at the discretion of the Bishop Square Management.

3. The sale of merchandise or services is prohibited.

4. Signing of the area is subject to prior approval of Bishop Square Management and should be tasteful and professional. The use of hand

outs, flashing, lights, noise makers and other attention-getting devices is prohibited.

5. Use of the Park area is generally confined to charitable or non-profit groups, or those representing specific non-partisan community interests. Groups representing political candidates or issues are prohibited from activity.

6. Solicitation of funds, contributions signatures or participation in surveys must be passive; that is, Park invitees must voluntarily respond to approved signing and may not be actively accosted by group members. Likewise, literature may be

distributed only upon the request of the recipient.

7. The premises occupied must be left in the same condition or orderliness and cleanliness as when received.

8. The areas of the Park used by the public are not public ways but are for the use of Bishop Square tenants and the public transacting business with them. Permission to use said areas may be revoked by Bishop Square Management at any time.